



# The RESEARCHER

Published by The Refugee Documentation Centre | [RDC@legalaidboard.ie](mailto:RDC@legalaidboard.ie)

Welcome to the April 2016 issue of *The Researcher*.

In this issue Dounia Katibi of UNHCR Ireland looks at Article 1D of the 1951 Convention concerning Palestinian refugees and its interpretation and application under national asylum systems.

Michael Byrne of the Irish Refugee Council considers risk assessment or risk avoidance in relation to persecution for reasons of religion referring to CJEU v ECtHR.

Patrick Dowling, Refugee Documentation Centre writes on the recent targeting of Bloggers in Bangladesh.

Noeleen Healy of Smithfield Law Centre refers to case law and looks at country of origin information in the asylum process.

David Goggins of the Refugee Documentation Centre investigates the situation in South Sudan and its civil war.

Boris Panhölzl from ACCORD provides an update on how ecoi.net prioritise their list of countries and the sources and documents you can expect to find.

Many thanks to all our contributors, if you are interested in contributing to future issues please contact us at the email address below.

*Elisabeth Ahmed*  
Refugee Documentation Centre (Ireland)

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### The Researcher is published bi-annually by:

The Refugee Documentation Centre, Montague Court,  
7-11 Montague Street, Dublin 2, Ireland  
Phone: + 353 (0) 1 4776250  
Fax: + 353 (0) 1 6613113  
[RDC@legalaidboard.ie](mailto:RDC@legalaidboard.ie)

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### Editors:

Elisabeth Ahmed: [EAahmed@legalaidboard.ie](mailto:EAahmed@legalaidboard.ie)  
David Goggins: [DAGoggins@legalaidboard.ie](mailto:DAGoggins@legalaidboard.ie)

## Beyond Exclusion: Palestinian Refugees and the 1951 Refugee Convention



Dounia Katibi, UNHCR Ireland<sup>1</sup>

### Introduction

The primary purpose of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) is to ensure that the rights of refugees and asylum-seekers are protected, which it aims to achieve by placing obligations upon states parties to guarantee the dignified treatment of refugees until a more durable solution is found for them. It is the cornerstone of modern international refugee law.

Refugee-hood is not a recent concept however, as “throughout human history, people have been forced to flee their homes and states of origin in search of protection and safety elsewhere.”<sup>2</sup> States and regions have dealt with refugee influxes in varying ways over the centuries. The pattern of international action on behalf of refugees was established by the League of Nations and led to the adoption of a number of international agreements for their benefit. These instruments are referred to in Article 1A(1) of the 1951 Convention providing continued recognition to such refugees. In addition, the two primary UN agencies mandated to deal with refugee issues, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and the United Nations High Commissioner for Refugees (UNHCR) were already established by 1951 (1948 and 1950

respectively) and the Convention was drafted in a complementary fashion. Indeed the statute of UNHCR and the draft 1951 Convention were both prepared by the General Assembly’s Third Committee.<sup>3</sup> This interpretative context is key to a proper understanding of Article 1D of the 1951 Refugee Convention which I shall consider in this paper.

### Inclusionary and exclusionary clauses

The refugee definition set out in Article 1A(2) of the 1951 Refugee Convention, is an ‘inclusionary’ clause that establishes the key criteria which a person must fulfil in order to be included within the protections of the Convention.

The 1951 Refugee Convention also includes a number of ‘exclusionary’ clauses. A closer look at these, specifically Article 1D, reveals that a special group of refugees must be treated in a very particular way under the Convention. Paragraph 1 of Article 1D provides that the Convention:

“shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.”<sup>4</sup>

This is clearly an exclusionary clause that applies to the relevant category of persons such that they are ineligible for the protections set out in the Convention. However, Article 1D then proceeds to state in paragraph 2 that

“when such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.”<sup>5</sup>

The second paragraph is an inclusionary clause, the aim of which is to ensure that protection gaps do not arise for persons in need of the protection of the Convention.

The ‘special group of refugees’ referred to in Article 1D are Palestinian refugees. Following the 1948 Arab-

<sup>1</sup> Dounia Katibi is a Protection Intern at UNHCR Ireland.

Any views expressed are the author’s own

<sup>2</sup> Peter Fitzmaurice, ‘Between the Wars - The Refugee Convention of 1933: A Contemporary Analysis’, *The Challenge of Human Rights: Past, Present and Future* (1st edn, Edward Elgar 2012) 239.

<sup>3</sup> Andreas Zimmermann, ‘The 1951 convention relating to the Status of Refugees and its 1967 Protocol, A commentary’, (2011), OUP Oxford 547.

<sup>4</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention) art1D (1).

<sup>5</sup> *Ibid* art1D (2).

Israeli conflict, the international community acknowledged that Palestinian refugees have specific needs, which led the drafters of the Convention to establish a special status for Palestinian refugees under international law through Article 1D.<sup>6</sup> As Article 1D contains both exclusionary and inclusionary provisions, it is essential that decision-makers and legal practitioners fully understand the specific terms of the Article and to whom they apply.

The aim of this paper is to outline the main interpretative difficulties that can arise in the application of Article 1D. It will start by presenting the purpose of the Article and the interpretation that should prevail in the course of examining applications for international protection lodged by Palestinian individuals. UNHCR's statute provides that UNHCR has a duty to supervise the application "of international conventions for the protection of refugees"<sup>7</sup> while the Convention requires states parties to cooperate with UNHCR in order to facilitate the exercise of its functions.<sup>8</sup> Consequently, this paper will consider UNHCR's guidelines and recommendations in relation to the proper interpretation of Article 1D.

A key element of Article 1D(2) is not simply its inclusionary character, but the fact that its correct application means that eligible Palestinians should automatically avail of the Convention's protection, without needing to satisfy the 'well-founded fear' threshold outlined in Article 1A(2). This aspect of Article 1D will be analysed with reference to case law from the Court of Justice of the European Union (CJEU) on Article 12 of the Qualification Directive (QD) which incorporates Article 1D in EU law.<sup>9</sup> Finally, it will refer to two judgments from Ireland's High Court which shed light on the difficulties that can arise in applying Article 1D in practice. The paper will show how a misinterpretation of Article 1D in general and of its *ipso facto* element in particular can create protection gaps and jeopardize the legal framework according to which Palestinian applications should be dealt with.

<sup>6</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, (26 November 1951) <<http://www.unhcr.org/3ae68cda4.html>> accessed 22 March 2016.

<sup>7</sup> UN General Assembly, 'Statute of the Office of the United Nations High Commissioner for Refugees' established by UNGA Res 428(V) (14 December 1950) UN Doc A/RES/428(V) para8 (a).

<sup>8</sup> 1951 Refugee Convention (n 4) Art35.

<sup>9</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 art12(1)(a).

## Greater protection for Palestinian refugees intended through Article 1D

The 1948 Arab-Israeli conflict has contributed to one of the most prolonged and problematic refugee situations of all time.<sup>10</sup> More than 5 million Palestinian refugees are registered with UNRWA today.<sup>11</sup>

UNRWA was established in December 1948 by the United Nations General Assembly Resolution 302(IV) with a mandate "to carry out in collaboration with local governments the direct relief and works programmes"<sup>12</sup> in support of 'Palestine refugees'.

Unlike UNHCR, which has a global mandate to provide international protection to and seek durable solutions for refugees worldwide,<sup>13</sup> UNRWA provides assistance to specific categories of Palestinian refugees who are present within its area of operations which extends over Syria, Lebanon, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip.<sup>14</sup> It is also worth noting that when UNRWA was first established, it was perceived as a temporary agency due to the certitude that the Palestinian displacement was temporary. This was illustrated by the General Assembly Resolution 194, which declared that Palestinian refugees have the right of return and should be able to repatriate "at the earliest practicable date."<sup>15</sup> However, the absence of a political solution in respect of the Arab-Israeli conflict has led to the continuous renewal of UNRWA's mandate, which has most recently been extended until 30 June 2017.<sup>16</sup>

Despite the fact that no particular group of refugees is explicitly referred to in Article 1D, the latter's drafters had precisely intended to target Palestinian refugees<sup>17</sup> as demonstrated by the corresponding *travaux préparatoires*. In addition and as affirmed by

<sup>10</sup> BADIL Resource Center for Palestinian Residency and Refugee Rights, 'Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention' (BADIL 2015) <<http://reliefweb.int/sites/reliefweb.int/files/resources/Art1D-2015Handbook.pdf>> accessed 5 February 2016 6-9.

<sup>11</sup> UNHCR, 'UNHCR Global Trends 2014: World at War' (18 June 2015) 2 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=558292924&skip=0&qery=global%20trends>> accessed 20 March 2016.

<sup>12</sup> UN General Assembly 'Assistance to Palestinian Refugees' established by UNGA Res 302(IV) (8 December 1949) (A/RES/302) para7 (a).

<sup>13</sup> UN GA Res 428(V), 'Statute of the UNHCR' (n 7) para1.

<sup>14</sup> UNRWA, 'Where we work' <<http://www.unrwa.org/where-we-work>> accessed 29 January 2016

<sup>15</sup> UN General Assembly, 'Right of Return' established by UNGA Res 194 (III) (11 December 1948) (A/Res/194) Para11.

<sup>16</sup> UNRWA 'Who We Are' <<http://www.unrwa.org/who-we-are>> accessed 5 February 2016.

<sup>17</sup> Mutaz Qafisheh and Valentina Azarov, 'Article 1D 1951 Convention', *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (1st edn, Oxford University Press 2011) 544.

Takkenberg, while the most crucial right of refugees in general is the right to *non-refoulement*, the main concern in relation to Palestinian refugees specifically is the treatment they receive in host states rather than the right not to be returned to their country of origin, Palestine.<sup>18</sup>

Moreover, most states parties to the Convention were keen to avoid a mass influx of refugees coming from Palestine to apply for international protection in their countries.<sup>19</sup> As a result, Palestinians were provided with a separate regime under the Convention as well as UNHCR's mandate<sup>20</sup> because "the prospect of returning to their homes would be negatively affected if they were included in the mandate of UNHCR."<sup>21</sup>

Despite this, the 'exclusionary' paragraph only of Article 1D is frequently employed by decision-makers and refugee law practitioners, whereas the inclusionary, protection focused provisions of paragraph 2 of Article 1D are widely misunderstood and misapplied, resulting in erroneous examinations of Palestinian claims.

### Article 1D: Beyond exclusion

In UNHCR's most recent note on the interpretation of Article 1D published in May 2013, the agency highlights that Article 1D has two main purposes. The first one is to avoid overlapping capabilities between UNHCR and other UN agencies, namely UNRWA,<sup>22</sup> as a way of "facilitat[ing] the international community's administration of the refugee problem,"<sup>23</sup> which is clearly illustrated in the exclusion clause of the first paragraph of Article 1D. The second purpose is to safeguard the continuity of the assistance or protection provided to Palestinian refugees whenever this same protection or assistance that was delivered by UNRWA has stopped, as manifested in the second paragraph of Article 1D.<sup>24</sup>

The drafters' intention was to automatically include Palestinian refugees under the Convention if the

<sup>18</sup> Lex Takkenberg, *The Status Of Palestinian Refugees In International Law* (Clarendon Press 1998) 86-90.

<sup>19</sup> Marguerite Perin, 'European and International Law and Palestinian Refugees: Bolbol, El Kott and the Application of Article 1D of the Geneva Convention' [2013] 89 *Journal of Law and Jurisprudence*.

<sup>20</sup> UN GA Res 428(V), 'Statute of the UNHCR' (n 7) para7(c).

<sup>21</sup> Takkenberg (n 18) 66.

<sup>22</sup> UNHCR, 'Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection' (May 2013) 2.

<sup>23</sup> Qafisheh and Azarov (n 17) 550.

<sup>24</sup> UNHCR, 'Note on UNHCR's Interpretation of Article 1D' (n 22).

assistance provided by UNRWA, which is currently the only UN agency to which Article 1D relates,<sup>25</sup> has "ceased for any reason."<sup>26</sup> Many decision-makers fail to sufficiently take this inclusionary clause into consideration when dealing with Palestinian applicants. This clause, notably the *ipso facto* element of it, is key as it provides that whenever the applicant stops receiving protection or assistance from UNRWA, he/she shall be automatically granted refugee status and his/her claim shall not be assessed on the basis of a well-founded fear of persecution.

### Who falls within the scope of Article 1D?

UNHCR considers that there are two categories of Palestinian refugees who should be examined under Article 1D of the 1951 Refugee Convention as opposed to Article 1A. The first one is composed of 'Palestine refugees' defined by UNRWA as "person[s] whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict."<sup>27</sup> The second category is constituted of Palestinians who are 'displaced persons' following the Arab-Israeli conflict of 1967 and who have not been able to go back to the occupied Palestinian territories since that year. The descendants of both categories must also be considered under Article 1D.<sup>28</sup> Consequently, only the asylum applications lodged by Palestinians who do not fall under one of the categories referred to above shall be examined in accordance with Article 1A (2) of the Convention under which a well-founded fear of persecution is required in order to be declared a refugee.<sup>29</sup>

When dealing with a Palestinian applicant, the decision-maker must consider the following questions: does the applicant fall under one of the categories of Palestinians mentioned above? If not, the application must be examined under Article 1A (2) with a focus on a well-founded fear of persecution based on one of the five grounds listed in the definition of a refugee. However, if the decision-maker establishes that the applicant is a 'Palestine refugee', a 'displaced person' as a result of the 1967 war or a descendant of one of

<sup>25</sup> Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal (Hungary) [2012] C-364/11, (EUCJ GC, 19 December 2012) para48.

<sup>26</sup> 1951 Refugee Convention (n 4) art1D (2).

<sup>27</sup> UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), *Consolidated Eligibility and Registration Instructions (CERI)*, 1 January 2009, <<http://www.refworld.org/docid/520cc3634.html>> accessed 23 April 2015.

<sup>28</sup> UNHCR, 'UNHCR Revised Statement on article 1D of the 1951 Convention' (October 2009) 6-7.

<sup>29</sup> UNHCR, 'Note on UNHCR's Interpretation of Article 1D' (n 22) 2-3.

the two categories, his/her asylum application should be examined under Article 1D. The question that will subsequently follow from this is: does that applicant fall under the first paragraph (exclusionary clause) or the second paragraph (inclusionary clause) of Article 1D? In other terms, is he/she excluded from the benefits of the Convention or rather included under the *ipso facto* character of Article 1D (2) which triggers the immediate grant of refugee status due to the fact that the assistance he/she has received or is eligible to receive has been terminated?<sup>30</sup> In considering such questions, a decision-maker must be aware of how the specific phrasing of Article 1D should be interpreted. This paper will now examine two of the core phrases within Article 1D that have been the subject of both CJEU and UNHCR interpretation.

### “Eligible to avail of” versus “actually availing of” the protection or assistance of UNRWA

Article 12 (1)(a) of the QD reproduces Article 1D of the 1951 Refugee Convention in an identical fashion.<sup>31</sup> It is crucial therefore to refer to case law from the CJEU which illustrated how controversial the interpretation of Article 12 (1)(a) of the QD could be, notably in relation to what is meant by the term “receiving”.

In *Bolbol v Hungary*, the CJEU examined the case of Ms Bolbol, a Palestinian woman who fled the Gaza strip and arrived in Hungary where she was refused refugee status. The CJEU considered the meaning of “at present receiving” assistance in order to determine whom Article 1D applied to. It ruled that in order to fall under the first sentence of Article 12(1)(a) of the QD, the Palestinian applicant needs to have *actually availed of* the protection or assistance of UNRWA rather than merely being eligible to receive such protection or assistance.<sup>32</sup> This ruling was based on the notion that “clear wording of Article 1D of the Geneva Convention (...) [must be] construed narrowly,”<sup>33</sup> and cannot subsequently cover people who are only eligible to receive assistance from UNRWA.

However, in its 2013 note on Article 1D, UNHCR opposes the narrow interpretation of Article 1D (1) which the CJEU has ruled in favour of, and considers that such interpretation would negatively affect one of

<sup>30</sup> Susan Akram, 'Palestinians Who Fall Under the 1951 Convention' (Rights in Exile Programme) <<http://www.refugeelaidinformation.org/palestinians-who-fall-under-1951-convention>> accessed 10 February 2016; BADIL (n 10) 53.

<sup>31</sup> Council Directive 2004/83/EC (n 9).

<sup>32</sup> *Nawras Bolbol v. Bevéndorlási és Állampolgársági Hivatal (Hungary)* [2010] C-31/09, (EUCJ GC, 17 June 2010) para53.

<sup>33</sup> *Ibid* para50.

the primary purposes of Article 1D which is to acknowledge the continuity of the Palestinians’ refugee character.<sup>34</sup> Indeed, if those who were eligible but not receiving assistance from UNRWA could not be covered by Article 1D (1), then Article 1D (2) would not be accessible to them either and they would not subsequently be included within the mandate of UNHCR. This would create protection gaps for certain categories of Palestinian refugees.<sup>35</sup> In other terms, the act of not including Palestinians who are “entitled” to receive protection or assistance from UNRWA within the application of Article 1D would deny them access to their rights under international law.<sup>36</sup> Therefore, according to UNHCR, the interpretation of the term “receiving” should include Palestinians who are either receiving or eligible to receive assistance or protection from UNRWA.<sup>37</sup>

In light of the above, it is necessary to refer to Article 3 of the QD which stipulates that under EU law, Member States may introduce “more favourable standards for determining who qualifies as a refugee.”<sup>38</sup> UNHCR strongly encourages Member States to consider a less restrictive approach in relation to the application of Article 12(1) (a) of the QD and the interpretation of “receiving”, which would ensure a more favourable standard of protection than that espoused by the CJEU’s decision in *Bolbol*. This is due to the fact that UNHCR considers that the broader interpretation is in accordance with the object and purpose of Article 1D as it avoids creating protection gaps in the implementation of international refugee law in general, and Article 1D in particular.<sup>39</sup>

### Article 1D’s inclusion clause in light of the most recent CJEU Judgment

Following from the *Bolbol* judgment, the CJEU provided further clarifications on the interpretation of Article 1D in its *El Kott and Others v. Hungary* ruling. The case involved three Palestinians who had to leave UNRWA’s area of operation in Lebanon for security reasons and were subsequently refused refugee status in Hungary.<sup>40</sup> In that case, the court considered the meaning of the ‘inclusionary’ second paragraph of

<sup>34</sup> UNHCR, ‘Note on UNHCR’s Interpretation of Article 1D’ (n 22) 2-4.

<sup>35</sup> Perin (n 19) 99-100.

<sup>36</sup> *Ibid*.

<sup>37</sup> UNHCR, ‘Revised Note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees’ (2009) 28 Refugee Survey Quarterly; BADIL (n 10) 55-56.

<sup>38</sup> Council Directive 2004/83/EC (n 9) art3.

<sup>39</sup> UNHCR, ‘Note on UNHCR’s Interpretation of Article 1D’ (n 22) 4.

<sup>40</sup> *El Kott and Others v. Bevéndorlási és Állampolgársági Hivatal* (n 25).

Article 1D, repeated in Article 12(1)(a) of the QD. The Article refers to persons for whom “such protection or assistance has ceased for any reason” (i.e. the protection or assistance of UNRWA). The CJEU considered the meaning of “ceased for any reason” and ruled that in order to be included under the benefits of the 1951 Refugee Convention, the protection or assistance provided by UNRWA should have ceased for reasons *that are beyond the applicant’s control and own volition*, whereas “[m]ere absence from such an area or a voluntary decision to leave it cannot be regarded as cessation of assistance.”<sup>41</sup> Where assistance has ceased for reasons beyond the applicant’s control, it is crucial to note that the applicant will not have to prove that he/she has a well-founded fear of persecution, as he/she should instead be granted refugee status automatically. However, if the applicant has voluntarily left UNRWA’s area of operation, he/she shall not be covered by Article 1D (2) and cannot be automatically recognized as a refugee under the Convention.<sup>42</sup>

UNHCR made an *amicus curiae* intervention at the CJEU in *El Kott*, which provides insight into the agency’s interpretation of “for any reason”. UNHCR considered that in order for a Palestinian applicant to be “*ipso facto*” entitled to the benefits of the 1951 Refugee Convention, the expression “for any reason” should not be construed restrictively.<sup>43</sup> The decision-maker must inspect the objective reasons behind the cessation of UNRWA’s assistance in respect of the applicant, in particular “any objective reason outside the control of the person concerned such that they are unable to avail themselves of the protection or assistance of UNRWA.”<sup>44</sup>

UNHCR elaborated further to say that such reasons may involve not only the cessation of UNRWA as an agency, they should also include some protection-related and practical obstacles that would bar the applicant from returning to an UNRWA area of operation.<sup>45</sup> Most importantly and subsequent to the *El Kott* judgement, UNHCR updated its 2009 interpretation of Article 1D with a new focus on UNRWA’s activities rather than the mere physical presence of the applicant within or outside UNRWA’s

areas of operation. Accordingly, if UNRWA’s assistance has been terminated for reasons that are beyond the applicant’s control, the latter shall automatically be entitled to refugee status once he/she does not fall under any of the other exclusion clauses of Articles 1C, 1E or 1F. Such interpretation is, once again, in line with the object and purpose of Article 1D,<sup>46</sup> noting that “in each case, the motives and circumstances of the departure have to be examined individually.”<sup>47</sup>

### Application of Article 1D in the context of Ireland’s High Court Decisions

The above discussion on the interpretation of Article 1D shows that this provision is controversial and is open to misinterpretation by national asylum authorities.<sup>48</sup> In Europe, the Article is far from being implemented in accordance with its object and purpose, noting that most European states generally tend to examine asylum applications lodged by Palestinians under Article 1A rather than Article 1D of the 1951 Refugee Convention,<sup>49</sup> rendering the position of Palestinians problematic under international refugee law.

The Refugee Act 1996 (as amended) currently regulates applications for refugee status in Ireland, reproducing Article 1D (1) in section 2.<sup>50</sup> Ireland has also ratified the 1951 Refugee Convention and has opted into the 2011 QD. Therefore, the State has an obligation to ensure the adequate application of Article 1D in line with its obligations under international and European law.

Some of Ireland’s High Court decisions have shown that applications lodged by Palestinians have historically tended to be examined under Article 1A, and that where Article 1D was considered, in some instances, it has been misinterpreted.<sup>51</sup>

In *S.H.M v. Refugee Appeals Tribunal & Anor*,<sup>52</sup> the Court examined the application lodged by a Palestinian born in Libya who had lived all of her life there prior to arriving in Ireland in 2000. When she was unsuccessful in her appeal relating to an application for refugee status at the Refugee Appeals Tribunal (RAT), she initiated judicial review proceedings before the

<sup>41</sup> Ibid para58-59.

<sup>42</sup> Gábor Gyulai, ‘Protecting Stateless Palestinian Refugees: The EU Court of Justice Opens a New Chapter’ (*European Network on Statelessness*, 2013) <<http://www.statelessness.eu/blog/protecting-stateless-palestinian-refugees-%E2%80%93-eu-court-justice-opens-new-chapter>> accessed 9 February 2016.

<sup>43</sup> UNHCR, ‘UNHCR’s Oral Intervention at the Court of Justice of the European Union: Hearing of the case of *El Kott and Others v. Hungary*’ (2012) 19.

<sup>44</sup> Ibid.

<sup>45</sup> UNHCR, ‘Note on UNHCR’s Interpretation of Article 1D’ (n 22) 5-6.

<sup>46</sup> UNHCR, ‘UNHCR’s Oral Intervention’ (n 43).

<sup>47</sup> BADIL (n 10) 559.

<sup>48</sup> Gyulai (n 42) 1.

<sup>49</sup> Akram (n 30); Gyulai (n 42).

<sup>50</sup> Refugee Act 1996 (last amended in 2003), [Ireland], 15 July 2003, section 2.

<sup>51</sup> BADIL (n 10) 153.

<sup>52</sup> *S.H.M v. Refugee Appeals Tribunal & Anor (Ireland)* [2009] IEHC 128.

High Court. The Tribunal had determined her appeal by reference to Article 1A as a stateless person, finding Libya to be her country of former habitual residency, and did not consider Article 1D, even though it was noted that the applicant was a descendant of parents who fled Gaza after the 1967 war.<sup>53</sup> The Court upheld the Tribunal decision that the applicant had failed to demonstrate a well-founded fear of persecution and that for this reason, she should not be granted refugee status.<sup>54</sup> The Court also stated that inability to return to the country of former habitual residence, Libya in this case, did not lead to a well-founded fear of persecution.<sup>55</sup> It is important to note that if this same application was to be examined under Article 1D, the outcome of the decision might have been different as:

- The applicant fell within one of the categories of Palestinians who are under UNRWA's mandate and who, therefore, shall be included within the scope of Article 1D, namely a descendant of "displaced persons" as a result of the 1967 war;
- She was eligible to receive UNRWA's assistance and was thus normally excluded from the protection of the 1951 Refugee Convention, as per Article 1D paragraph 1;
- However, if it had been established that she could not avail herself of UNRWA's protection for reasons outside her control, provided that Article 1C, 1E and 1F did not apply in her case, she should have been included under Article 1D (2) where she could automatically be granted refugee status under the 1951 Refugee Convention, without needing to show a well-founded fear of persecution.

In a more recent decision, *M.A v. Refugee Appeals Tribunal & Ors*, the High Court reviewed a RAT decision where Article 1D was applied wrongfully.<sup>56</sup> The case involved an applicant of Kurdish ethnicity who was born in Iran and who fled as he feared persecution there.<sup>57</sup> The High Court found that the RAT had misapplied Article 1D in this case as the Member concluded that the applicant did not fall under the refugee definition because he was receiving protection from UNHCR. The Tribunal Member had failed to realize that the provision refers instead to those who are receiving protection or assistance from UN agencies "other than UNHCR,"<sup>58</sup> namely individuals of Palestinian origin receiving assistance

from UNRWA.<sup>59</sup> Therefore, individuals who have received protection or assistance from UNHCR in another country do not fall within the scope of Article 1D.

### Concluding remarks

Article 1D should always be interpreted in line with the object and purpose of the 1951 Refugee Convention as well as the "wording, historical context and purpose of the provision"<sup>60</sup> itself. The drafters of Article 1D intended to provide special consideration to Palestinians under international refugee law and ensure they did not fall into any protection gaps. However, the correct application of the Convention to Palestinian refugees is challenging due to a lack of consistency in the interpretation and application of Article 1D under national asylum systems.

Indeed, the Convention should be analyzed in accordance with the principle of good faith which is enshrined in international law and explicitly referred to in Article 31 of the Vienna Convention of the Law of Treaties which states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>61</sup>

A common criticism of Article 1D revolves around the fact that the Article does not distinguish between the concepts of "protection" and "assistance", noting that Palestinians under UNRWA are often only provided with basic assistance as opposed to other refugees who benefit from greater protection of their human rights under the 1951 Refugee Convention. Certain aspects of Article 1D remain very controversial and open to various interpretations.

Although UNHCR's guidelines are not legally binding, they offer a fundamental insight into the most satisfactory interpretation of Article 1D that should be persuasive when examining applications for international protection lodged by Palestinians, acknowledging that "in supervising the application of the 1951 Convention throughout the world for over 60 years, UNHCR has developed unique expertise on refugee law and asylum issues."<sup>62</sup> In 2014, UNHCR circulated a call for comments on the applicability of

<sup>59</sup> *M.A v. Refugee Appeals Tribunal & Anor* (n 57).

<sup>60</sup> Akram (n 30).

<sup>61</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art31 (1).

<sup>62</sup> Volker Türk, 'Keynote Address' (Colloque à l'Occasion des 60 ans de la CNDA, Paris, 29 October 2012) 3

<<http://www.refworld.org/pdfid/512e09b22.pdf>> accessed 22 March 2016.

<sup>53</sup> Ibid para4.

<sup>54</sup> Ibid para57-58.

<sup>55</sup> Ibid para41.

<sup>56</sup> BADIL (n 10) 154-155.

<sup>57</sup> *M.A v. Refugee Appeals Tribunal & Anor (Ireland)* [2013] IEHC 36, (High Court of Ireland, 31 January 2013).

<sup>58</sup> 1951 Refugee Convention (n 4) art1D (1).

Article 1D, in preparation for the issuance of new guidelines subsequent to the latest note that was published in May 2013.

In light of the current refugee crisis and the huge increase in the number of individuals seeking refuge in Europe, as well as the impact of the Syrian conflict on Palestinian refugees residing there, it will be beneficial to examine the approach that UNHCR will take in relation to its interpretation of Article 1D through its new guidelines, when they are published. It will also be interesting to see if and how states' practice and interpretation of Article 1D will consequently evolve in respect of that Article's application.

## **Risk assessment or risk avoidance? Claims of persecution for reasons of religion: CJEU v ECtHRs**



Michael Byrne, Irish Refugee Council

Difficulties can arise in establishing a well founded fear of persecution in some claims of persecution for reasons of religion. This difficulty is compounded when there has been no previous evidence of persecution while in the country of origin or where the State authorities do not know that the person has converted or has changed his religious beliefs, which may be contrary to law in that country; this difficulty arises especially in *sur place* claims. In addition difficulty arises also in cases where it is known or it is deemed likely that if the victims of religious persecution are returned to their country of origin they will act discreetly in regard to their religious practices and so act to avoid persecution by the State. This is a scenario where it appears that individual risk avoidance trumps State protection in achieving protection from persecution.

A question which arises from this scenario is should risk avoidance play any role in determining whether an applicant has a well founded fear of persecution? This question is at the heart of two recent cases at the Court of Justice of the European Union (CJEU) and at the European Court of Human Rights (ECtHRs). The CJEU has held in the joined case of X & Y<sup>63</sup> that risk avoidance should play no part in risk assessment whereas the majority in the chamber judgment at the



<sup>63</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012.



ECtHRs in *F.G. v Sweden*<sup>64</sup> disagreed and indicated that it does play a role in risk assessment.

This article examines the plausibility of either rejecting or accepting risk avoidance in assessing future based risk of persecution or of risk of harm contrary to Articles 2 & 3 of the European Convention on Human Rights (ECHR) in expulsion cases. It proceeds as follows it will firstly examine the law in regards to assessing risk in a context of risk avoidance, secondly it will examine arguments rejecting risk avoidance from the jurisprudence of Australia, UK, U.S.A., and the CJEU and thirdly it will assess the arguments in favour of accepting risk avoidance in risk assessment and finally it will argue that the claims in support of rejecting risk avoidance are the more plausible.

### Law – risk assessment in The Convention on the Status of Refugees (CSR)

The definition of a refugee provided by in the CSR in Article 1A (2) is:

- A. For the purpose of the present Convention, the term “refugee” shall apply to any person who: [...] 2. As a result of events occurring before 1 January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence...is unable or, owing to such fear is unwilling to return to it.<sup>65</sup>

The test of ‘well founded fear’ as outlined is a combined subjective and objective test - it seeks to determine whether an applicant’s subjective fear is justified on objective grounds.<sup>66</sup> It should also be

<sup>64</sup> *F.G. v Sweden* App. no. 43611/11 (ECtHR, 16<sup>th</sup> January 2014).

<sup>65</sup> Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950. Entry into force: 22 April 1954, in accordance with article 43. U.N.T.S. No. 2545, Vol. 189, p. 137. Irish signature 1 August 1951, Irish ratification 1 October 1954.

<sup>66</sup> U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/1P/4/enG/Rev. 3, December 2011, states:

To the element of fear – a state of mind and a subjective condition – is added to the qualification ‘well founded’. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that the frame of mind must be supported by an objective situation. The term ‘well founded fear’ therefore contains a subjective and an objective element...

noted that the terms ‘being persecuted’ imply an on-going or continuous fear involving two elements the actions of the persecutor and the impact of that persecution on the victim of persecution.<sup>67</sup> In cases of persecution for religious conversion the actions of persecution would include for example laws prohibiting apostasy inclusive of a death penalty sanction.<sup>68</sup> The impact of such actions of persecution on an applicant would be to violate the core human right of religious freedom recognised in most international human rights treaties.<sup>69</sup> In addition the violation of the fundamental human right to freedom of expression as political opinion has been held by the Federal Court of Australia to be persecution.<sup>70</sup> In regard to the human rights violations of Christian converts in Iran for example these face significant human rights violations on a frequent basis.<sup>71</sup>

### EU Qualification Directive (QD)<sup>72</sup>

There is no rule contained in the QD that allows an asylum examiner to take into consideration the possibility of risk avoidance on the part of an applicant in assessing well founded fear. Article 2 of the QD provides a definition of a refugee, Article 4 provides guidance on assessment of facts and circumstances and Article 9 provides guidance in determining what constitutes acts of persecution. It is important to note that in interpreting the requirements for refugee status in the QD the Refugee Convention is the most relevant source for such guidance.<sup>73</sup>

<sup>67</sup> *Minister for Immigration & Multicultural & Indigenous Affairs v Kord* (2002) 125 FCR 68 (Austl.), [2].

<sup>68</sup> See Advocates for Human Rights, Report on the Situation of Iranian Refugees in Turkey, June 2010, <http://www.omidadvocates.org/resources--reports.html> (accessed March 18 2016). Where it is possible for a convert who faces a criminal conviction for apostasy to be execution by the state. This is a rare occurrence - one documented case is that of the pastor Hossein Soodmand executed in 1990. The threat of execution for apostasy is frequently invoked by authorities to pressure Christians to cease their religious practices.

<sup>69</sup> See for example, Universal Declaration of Human Rights, UNGA res. 217A (III), 10 Dec. 1948 Art. 18; International Covenant on Civil and Political Rights, UNGA res 2200A (XXI), 23 Mar. 1976, Art. 18. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, UNGA res. 36/55, Nov. 1981, Art. 1.

<sup>70</sup> *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA 132 (Austl.).

<sup>71</sup> International Campaign for Human Rights in Iran, *The Cost of Faith: Persecution of Christian Protestants and Converts in Iran* (16 January 2013), [www.iranhumanrights.org](http://www.iranhumanrights.org) last viewed on the 10<sup>th</sup> March 2016.

<sup>72</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted..

<sup>73</sup> Article 78 (1) TFEU explicitly recognizes the Refugee Convention as relevant to the CEAS where it states: ‘This policy [CEAS] must be in accordance with the Geneva Convention of 28

## UNHCR – soft law – risk avoidance

The fact that an applicant was never punished for his religious conversion in his country of origin does not mean that a well founded fear does not exist.<sup>74</sup> In regard to assessing risk in the context of an applicant's decision to conceal his/her religious identity or practice the UNHCR has stated that a person should not have to conceal one's religious manifestation in order to avoid persecution:

Applying the same standard as for other Convention grounds, religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution. Indeed, the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors.<sup>75</sup>

What the UNHCR is stating is that the purpose of the CSR would be nullified if a person was compelled to act discreetly on return to his/her country of origin.

## Rejecting risk avoidance - Case of S395 Australia

This UNHCR reasoning rejecting concealment<sup>76</sup> as a pre-requisite for avoiding persecution was replicated in the Australian (LGBT) case of S395<sup>77</sup> which held that applicants who on returning to their country of origin should not have a duty imposed on them to conceal their identity and also held that where applicants were to abstain from the practice through concealing their LGBT identities this would also constitute a well founded fear of persecution.<sup>78</sup> The rationale for both

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*July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*

<sup>74</sup> In regard to LGBT matters but which raises similar concerns as regards religion see *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 12.

<sup>75</sup> U.N. High Commissioner for Refugees, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004, para. 13.

<sup>76</sup> U.N. High Commissioner for Refugees, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004, para. 13.

<sup>77</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* (S395).

<sup>78</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* (S395). 216 CLR at 489 (McHugh & Kirby JJ).

of these findings is that to impose discretion or to accept individual risk avoidance is to undermine the aim of the Refugee Convention to protect:

[t]he Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps—reasonable or otherwise—to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a ‘particular social group’ if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution.<sup>79</sup>

## Risk avoidance as persecution

Another key argument for rejecting reliance on risk avoidance in risk assessment is that it is tantamount to imposing a duty on an applicant to be discreet, which in itself is constitutive of persecution. As, how free and voluntary would the decision to act discreetly be in a country that persecutes one's religion. Applicants deciding to conceal their religious identity on return to their country of origin would be making that decision in conditions of a constant threat of serious harm and it is this ‘*threat of serious harm with its menacing implications that constitutes the persecutory conduct*’ a threat that the High Court of Australia denoted in S395<sup>80</sup> as persecutory conduct. So acting discreetly in everyday life would be conducted under conditions of being aware of the chilling presence of ‘*menacing implications*’.

So case S395<sup>81</sup> is authority for the proposition that an applicant who returns to his/her country of origin and behaves discreetly is not a voluntary or a reasonable choice, but is in effect a decision conditioned by coercion of living in a persecutory environment. It is tantamount to imposing on such an applicant a duty to conceal their religious manifestation. In this context the assessment of a future based risk of ‘being persecuted’ would need to consider the coercive influences underpinning such a forced decision in order to comprehensively assess the risk arising from concealment.

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<sup>79</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* (S395) at 489.

<sup>80</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* (S395).

<sup>81</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* (S395)

## Risk avoidance as persecution

In (HJ & HT)<sup>82</sup> the UKSC followed S395 and held that the rationale for rejecting the imposition of a duty to be discreet is premised on a claim that such forced self-repression would constitute persecution itself.<sup>83</sup> This rationale was also supported by the US Court of Appeal case of *Kazemzadeh v. U.S. Atty. Gen*<sup>84</sup> in an appeal against the holding by the Immigration judge that the applicant had failed to establish a well founded fear of persecution on account of his religion ‘because he did not prove that anyone in Iran is aware of his conversion to Christianity’. The implication being that the applicant could act discreetly and thereby avoid the risk of persecution. This decision was overturned by the US Court of Appeal where it held that: ‘We agree with the decision of the Seventh Circuit that having to practice religion underground to avoid punishment is itself a form of punishment’.<sup>85</sup>

## CJEU – risk avoidance

For the first time the CJEU had to consider the issue of risk avoidance in Y & Z<sup>86</sup> and the question raised was whether the CJEU would rely on any of the two core arguments rejecting risk avoidance, firstly that it undermines the Refugee Convention and secondly that risk avoidance itself may constitute persecution.

The facts of this case are that in January 2004 and August 2003 Y and Z respectively applied for asylum in Germany.<sup>87</sup> Both Y and Z claimed that their membership of the Muslim Ahmadiyya community, a reformist Islamic movement in Iran had forced them to flee Iran.<sup>88</sup> Y claimed he had been beaten in his home village and attacked at his place of worship by stone throwers and was also threatened to be killed, Z claimed he was mistreated and imprisoned as a result of his religious beliefs.<sup>89</sup>

This case involved a reference for a preliminary ruling in regard to the interpretation of Articles 2 (c) and 9 (1) of the Qualification Directive<sup>90</sup> to the CJEU from the

<sup>82</sup> *HJ (Iran) v SSHD* (HJ & HT), [2010] UKSC 31. [2011] 1 A.C. at 645 (Lord Rodger). (HJ & HT).

<sup>83</sup> *HJ (Iran) v SSHD* (HJ & HT), [2010] UKSC 31. [2011] 1 A.C. at 645 (Lord Rodger).

<sup>84</sup> 577 F.3d 1341, 1350 (11th Cir. 2009); at 1356.

<sup>85</sup> 577 F.3d 1341, 1350 (11th Cir. 2009); at 1354.

<sup>86</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012.

<sup>87</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012. Para. 30.

<sup>88</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012. Paras. 78 - 79.

<sup>89</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012. Para. 30.

<sup>90</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals

Bundesverwaltungsgericht (Germany) where the pertinent question relating to concealment of conduct was whether:

Is there a well founded fear of persecution, within the meaning of Article 2 (c) of [the] Directive..., if it is established that the applicant will carry out certain religious practices...after returning to the country of origin, even though they will give rise to a risk to his life, physical integrity or freedom, or can the applicant reasonably be expected to abstain from such practices?<sup>91</sup>

The CJEU concluded that in assessing risk of persecution noted that as there are no rules for assessing such risk in situations where it seems possible for an applicant to avoid persecution by abstaining from overt religious practices, concluded that such avoidance of risk through concealment is in principle irrelevant.<sup>92</sup> The core finding here is the determination that Article 2 (c) of the QD is interpreted to mean that any future based assessment of a well founded fear of persecution will not have to consider risk avoidance such as concealment of one’s religion as an alternative to international protection. The CJEU reasoning in this case follows closely the rationale provided by the UNHCR on risk avoidance.<sup>93</sup> The UNHCR claims that EU law on asylum determination would be undermined if an applicant for protection had to engage in un-authorized risk avoidance as the consequence of doing so would be to undermine the principle of the rule of law.

## ECtHRs – Minority - *F. G. v Sweden*<sup>94</sup>

or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p12; addendum OJ 2005 L 204, p 24) (‘QD’).

<sup>91</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012. Para. 45.

<sup>92</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012. Para. 79.

<sup>93</sup> U.N. High Comm’r for Refugees, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004, para. 13.

<sup>94</sup> *F.G. v Sweden* App. no. 43611/11 (ECtHR, 16<sup>th</sup> January 2014). Referred to the Grand Chamber on the 14<sup>th</sup> April 2014 and accepted by the Grand Chamber on the 2<sup>nd</sup> June 2014. The Grand Chamber hearing was heard on the 3<sup>rd</sup> December 2014. The Grand Chamber judgment was delivered on the 23<sup>rd</sup> March 2016. The judgment held that there had been a breach of Articles 2 & 3 ECHR on procedural grounds in that the member State failed to conduct an effective assessment of the risk of harm due to religious conversion, if the applicant was to be returned to Iran. The Grand Chamber did not make any findings in regard to risk avoidance, but did note that the Director General for Legal Affairs at the Swedish Migration Board issued a ‘general legal position’ to the effect:

‘A person who has undergone a genuine change of faith or who risks being attributed a new religious belief and who

The minority judgment rejected the use of risk avoidance in risk assessment. They relied in their argument on the reasoning in *X & Y*<sup>95</sup> that there was no valid legal basis for considering risk avoidance in assessing risk of well founded fear of persecution. The three dissenting judges claimed that the Swedish authorities had failed to carry out a rigorous risk assessment of future based religious persecution.<sup>96</sup> The minority judgment in rejecting reliance on risk avoidance supported their claim by identifying the lack of legal justification for reliance on risk avoidance in the jurisprudence of the ECtHRs:

We consider that there is nothing under the case law of this Court which holds otherwise when it comes to the European Convention on Human Rights.<sup>97</sup>

The minority also supported their argument by reference to the CJEU cases of *Y* (C-71/11) and *Z* (C-99/11)<sup>98</sup> which rejected reliance on risk avoidance as irrelevant as it had no valid legal basis under the Qualification Directive.

In summary the core arguments supportive of rejecting risk avoidance in risk assessment of well founded fear is that to rely on it is to undermine EU asylum law if it was a condition that the applicant for protection should conceal their religious activity so as to avoid offending their persecutors.

Secondly reliance on risk avoidance may itself constitute persecution as the decision to conceal one's religious beliefs or practice is not a free voluntary decision but is one that is imposed on the applicant through the presence of a persecutory environment in the country of origin.

### Accepting of risk avoidance – Hathaway & Pobjoy

In contrast Hathaway and Pobjoy<sup>99</sup> argue that the cases of *S395*<sup>100</sup> and (*HJ & HT*)<sup>101</sup> are wrongly decided and claim that where a person conceals his/her identity on

therefore risks persecution should not be compelled to hide his or her faith solely in order to avoid persecution.' Para. 145.

<sup>95</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012.

<sup>96</sup> *F.G. v Sweden* App. no. 43611/11 (ECtHR, 16<sup>th</sup> January 2014).

<sup>97</sup> *F.G. v Sweden* App. no. 43611/11 (ECtHR, 16<sup>th</sup> January 2014).

<sup>98</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z* 5 September 2012.

<sup>99</sup> James C Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2011) 44 NYUJ Int'l L. 315, 338.

<sup>100</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* (S395)

<sup>101</sup> *HJ (Iran) v SSHD* (HJ & HT), [2010] UKSC 31. [2011] 1 A.C

return to their country of origin there would exist no real objective basis for a finding of a well founded fear of future based persecution on the basis that the concealment of the applicant's conduct in these cases would mean that the risk feared would never eventuate. Hathaway and Pobjoy support their claim by viewing an applicant's decision to conceal their identity as done on the sole grounds of subjective fear, this they claim does not support the objective limb of there being present a well founded fear on the basis that the expected harm would never occur as the modification in conduct would result in the risk of persecution never arising.<sup>102</sup>

Hathaway and Pobjoy are basically claiming that an applicant is not entitled to claim asylum on account of his religion if he can practice it in confinement and thereby avoid being identified by the authorities.

### ECtHRs – Majority - *F. G. v Sweden*<sup>103</sup>

This case indicated acceptance of risk avoidance which resulted in undermining a claim of harm contrary to Article 2 ECHR and Article 3 ECHR. This is by indicating that an applicant could live in their country of origin without fear of persecution if they acted discreetly by concealing any outward manifestations of their religious beliefs. The applicant in this case was an Iranian who claimed asylum in Sweden in 2009 and who also claimed a risk of harm contrary to Articles 2 ECHR and Article 3 ECHR if returned to Iran on the basis of his conversion to Christianity in Sweden.<sup>104</sup> The Swedish tribunal in adjudicating the applicant's claim of future persecution on grounds of religion took into consideration the fact that the applicant had kept his faith a private matter while in Sweden and also noted that the Iranian authorities would not be aware of his conversion in Sweden and on this basis held that there would be no real risk of a breach of Articles 2 ECHR or Article 3 ECHR if the applicant was to be returned to Iran.

So in summary supporters of this view assume that the decision to act discreetly is a voluntary and rationale decision. This argument also assumes that the decision to engage in risk avoidance actually results in risk avoidance rather than risk denial. The core argument in this analysis is that an applicant who engages in risk avoidance by concealing public manifestation of their

<sup>102</sup> James C Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2011) 44 NYUJ Int'l L. 315, 343.

<sup>103</sup> *F.G. v Sweden* App. no. 43611/11 (ECtHR, 16<sup>th</sup> January 2014). Referred to the Grand Chamber on the 14<sup>th</sup> April 2014 and accepted by the Grand Chamber on the 2<sup>nd</sup> June 2014. The Grand Chamber hearing was heard on the 3<sup>rd</sup> December 2014. The Grand Chamber judgment was delivered on the 23<sup>rd</sup> March 2016.

<sup>104</sup> *F.G. v Sweden* App. no. 43611/11 (ECtHR, 16<sup>th</sup> January 2014).

religious beliefs results in the inability of establishing objective ground for establishing a well founded fear of future persecution. This is on the putative ground that an applicant who acts discreetly would avoid any possibility of future persecution.

### Assessment of arguments

The arguments put forward in favour of rejecting risk avoidance in assessing claims of persecution or risk of harm contrary to Articles 2 and Article 3 ECHR are the more plausible. Hathaway and Pobjoy support the claim that an applicant engaging in risk avoidance conduct on return to their country of origin is not being persecuted on the grounds that the criteria for establishing an objectively well founded fear of persecution does not exist. This argument ignores the fact that risk avoidance conduct is constitutive of persecution in of itself. The well foundedness of persecution inherent to the decision of an applicant to engage in risk avoidance is located in the underlying coercive conditions in the country of origin influencing the person to act discreetly. This decision therefore to conceal is not a voluntary one but is essentially the forced imposition of a duty to conceal. Therefore any objective assessment of risk of a future persecution should consider the forced nature of the decision to engage in risk avoidance.

## “Freedom of our machetes”: The Killing of Bloggers in Bangladesh<sup>105</sup>



Patrick Dowling, Refugee Documentation Centre

### Introduction

Rafida Bonya Ahmed has learned how to type minus one thumb.<sup>106</sup> She sustained the injury along with many others after a machete attack on her and her husband Avijit Roy.<sup>107</sup> Both are bloggers and were targeted and attacked by Islamic extremists in February 2015 because of what they wrote.<sup>108</sup> Roy did not survive the attack and other bloggers were similarly killed subsequently during 2015 for expressing secular views.<sup>109</sup> The UN High Commissioner for Human

<sup>105</sup> Quote in title refers to a comment attributed to a militant group involved in the killing of bloggers in Bangladesh: Human Rights Watch (11 August 2015) *Bangladesh: Stop Promoting Self-Censorship*

<https://www.hrw.org/news/2015/08/11/bangladesh-stop-promoting-self-censorship>

<sup>106</sup> CNN (26 February 2016) *The 'sin' that could get you killed in Bangladesh*

<http://edition.cnn.com/2016/02/25/asia/bangladesh-secular-attacks-avijit-roy/>

<sup>107</sup> *ibid*;

Deutsche Welle (25 February 2016) *Bangladesh remains a dangerous country for bloggers*

<http://www.dw.com/en/bangladesh-remains-a-dangerous-country-for-bloggers/a-19071140;> &

Reporters Without Borders (3 March 2015) *Call for effective protection after another blogger hacked to death*

<http://en.rsf.org/bangladesh-call-for-effective-protection-27-02-2015.47635.html>

<sup>108</sup> Deutsche Welle *op.cit.*; &

The Guardian (22 August 2015) *The brutal fight of Bangladesh's secular voices to be heard*

<http://www.theguardian.com/world/2015/aug/22/brutal-fight-of-bangladeshs-secular-voices-to-be-heard>

<sup>109</sup> CNN *op.cit.*;

Wall Street Journal (31 December 2015) *Bangladeshi Court Convicts Two Men for Murder of Atheist Blogger*

<http://www.wsj.com/articles/bangladeshi-court-convicts-two-men-for-murder-of-atheist-blogger-1451577416;> &

New York Times (29 December 2015) *The Imperilled Bloggers of Bangladesh*



Rights in 2015 called on the Bangladeshi government to provide effective state protection for those who are exercising their right of freedom of expression.<sup>110</sup> This article is about attacks by Muslim extremists on secular bloggers in contemporary Bangladesh.<sup>111</sup>

## Attacks

Roy received death threats from Islamists prior to his murder because he had written critically about religion.<sup>112</sup> His writing promoted rationalist liberal secular thought, which included challenging religious intolerance and militancy, under the aegis of free expression.<sup>113</sup> After Roy's death, Washiqur Rahman was the second blogger murdered by Islamic extremists in 2015;<sup>114</sup> Rahman had also criticised

[http://www.nytimes.com/2016/01/03/magazine/the-price-of-secularism-in-bangladesh.html?\\_r=0](http://www.nytimes.com/2016/01/03/magazine/the-price-of-secularism-in-bangladesh.html?_r=0)

<sup>110</sup> United Nations Office of the High Commissioner for Human Rights (5 November 2015) *State must offer better protection to writers, publishers and others threatened by extremists in Bangladesh – Zeid*

<http://reliefweb.int/report/bangladesh/state-must-offer-better-protection-writers-publishers-and-others-threatened>

<sup>111</sup> For a history of blogging in Bangladesh see: The Guardian *op.cit.*;

International Federation of Journalists (4 February 2015) *Justice breakthrough in Bangladesh: more blogger killers arrested*

<http://www.ifj.org/nc/news-single-view/backpid/1/article/justice-breakthrough-in-bangladesh-more-blogger-killers-arrested/>; &

New York Times *op.cit.*,

<sup>112</sup> The Guardian *op.cit.*;

Washington Post (4 May 2015) *Bangladesh probes group suspected in blogger's death for ties to al-Qaeda*

[https://www.washingtonpost.com/world/asia\\_pacific/bangladesh-probes-group-suspected-in-bloggers-death-for-ties-to-al-qaeda/2015/05/04/28609a01-dabb-4a3e-8601-88d08d847f9a\\_story.html](https://www.washingtonpost.com/world/asia_pacific/bangladesh-probes-group-suspected-in-bloggers-death-for-ties-to-al-qaeda/2015/05/04/28609a01-dabb-4a3e-8601-88d08d847f9a_story.html); &

Human Rights Watch *op.cit.*,

<sup>113</sup> The Guardian *op.cit.*;

Reuters (10 September 2015) *Bangladesh arrests three more Islamists over killings of secular bloggers*

<http://www.reuters.com/article/bangladesh-bloggers-idUSKCN0RA1VT20150910>;

Amnesty International (12 May 2015) *Bangladesh: Authorities must deliver justice as third blogger is hacked to death*

<https://www.amnesty.org/en/latest/news/2015/05/bangladesh-authorities-must-deliver-justice-as-third-blogger-is-hacked-to-death/>;

International Press Institute (27 February 2015) *IPI calls for justice in killing of Bangladeshi blogger*

<http://www.freemedia.at/newssview/article/ipi-calls-for-justice-in-killing-of-bangladeshi-blogger.html>;

Article 19 (30 October 2015) *Bangladesh: Government failing to break Culture of Impunity*

<https://www.article19.org/resources.php/resource/38165/en/bangladesh-governments-failing-to-break-culture-of-impunity>; &

Committee to Protect Journalists (27 February 2015) *Blogger hacked to death, another seriously injured in Bangladesh*

<https://cpj.org/2015/02/blogger-hacked-to-death-another-injured-in-bangladesh.php>

<sup>114</sup> International Federation of Journalists (2 October 2015)

*Bangladesh must take action to end climate of intimidation and murder*

religion in his writing, including Islam.<sup>115</sup> Bijoy Das, who criticised religion's role in society and also wrote promoting secularism, did not survive a machete attack by Islamic fundamentalists, becoming the third murdered blogger in 2015.<sup>116</sup> Reporters Without Borders documented the attack on secularist blogger Niloy Neel in August 2015, where five intruders armed with machetes entered his home and hacked him to death, becoming in 2015 the fourth blogger murdered by Islamic extremists.<sup>117</sup> After his death the Committee to Protect Journalists urged the Bangladeshi government to provide better security for threatened journalists.<sup>118</sup>

<http://www.ifj.org/nc/news-single-view/backpid/1/article/bangladesh-must-take-action-to-end-climate-of-intimidation-and-murder/>

<sup>115</sup> Business Monitor International (1 January 2016) *Political And Economic Outlook At Risk From Rising Security Threats*

<http://www.lexisnexis.com/en-us/gateway.page>

<sup>116</sup> Freedom House (12 May 2015) *Bangladesh: Third Blogger Murdered*

<https://freedomhouse.org/article/bangladesh-third-blogger-murdered>; &

Amnesty International *op.cit.*,

<sup>117</sup> Reporters Without Borders (7 August 2015) *Fourth blogger on radical Islamist hit-list hacked to death*

<http://en.rsf.org/bangladesh-fourth-blogger-on-radical-islamist-07-08-2015.48205.html>

See also: Article 19 *op.cit.*;

Reuters (7 August 2015) *Blogger hacked to death in Bangladesh, fourth this year*

<http://www.reuters.com/article/bangladesh-blogger-idUSL3N10I43W20150807>; &

International Press Institute (7 August 2015) *Niladri Chattopadhyay, Bangladesh*

<http://www.freemedia.at/newssview/article/niladri-chattopadhyay-bangladesh.html>

A chronology of attacks during 2015 can be seen at: Business Monitor International *op.cit.*;

Agence France Presse (31 December 2015) *Timeline of attacks on Bangladesh's secular bloggers*

[http://www.lexisnexis.com/uk/legal/results/docview/docview.do?docLinkInd=true&risb=21\\_T23557361919&format=GNBFULL&sort=BOOLEAN&startDocNo=201&resultsUrlKey=29\\_T23557361931&cisb=22\\_T23557361930&treeMax=true&treeWidth=0&csi=10903&docNo=244sEEALASLAS](http://www.lexisnexis.com/uk/legal/results/docview/docview.do?docLinkInd=true&risb=21_T23557361919&format=GNBFULL&sort=BOOLEAN&startDocNo=201&resultsUrlKey=29_T23557361931&cisb=22_T23557361930&treeMax=true&treeWidth=0&csi=10903&docNo=244sEEALASLAS)

See also: Amnesty International (24 February 2016) *Amnesty International Report 2015/16 - The State of the World's Human Rights – Bangladesh*

[http://www.ecoi.net/local\\_link/319719/445087\\_en.html](http://www.ecoi.net/local_link/319719/445087_en.html); &

New York Times (1 January 2016) *Two Sentenced to Death in the Killing of a Blogger*

<http://www.lexisnexis.com/en-us/gateway.page>

<sup>118</sup> Committee to Protect Journalists (7 August 2015) *Fourth blogger killed in six months in Bangladesh*

<https://cpj.org/2015/08/fourth-blogger-killed-in-six-months-in-bangladesh.php>

For attacks on bloggers prior to 2015, see:

Voice of America (3 January 2016) *Bangladesh Blogger Killing Verdict Fails to Satisfy Community*

<http://www.voanews.com/content/bangladesh-blogger-killing-verdict-fails-to-satisfy-community/3129110.html> ;

International Federation of Journalists (4 January 2016) *IFJ welcomes first convictions in blogger's murder in Bangladesh*

## Threats

Niloy Neel and all the bloggers murdered in 2015 were featured on a list of bloggers issued by extremist Muslims in 2013.<sup>119</sup> The list which was initially presented to the interior ministry in Bangladesh, seeking that the respective bloggers be punished for blasphemy, was widely circulated afterwards including on the internet.<sup>120</sup> The bloggers and other secular writers on the list were deemed blasphemers and enemies of Islam.<sup>121</sup> In September 2015, a further list of bloggers and secular writers was issued by Islamists who threatened the adherents with death, many of whom had already fled Bangladesh.<sup>122</sup>

<http://www.ifj.org/nc/news-single-view/backpid/1/article/ifj-welcomes-first-convictions-in-bloggers-murder-in-bangladesh/>; &

The Daily Star (31 December 2015) *Bangladesh court sentences two to death for killing atheist blogger*

<http://monmol01.monitor.bbc.co.uk/mmu/>

<sup>119</sup> Human Rights Watch *op.cit.*; &

Amnesty International (12 May 2015) *Bangladesh: Authorities must deliver justice as third blogger is hacked to death*

<https://www.amnesty.org/en/latest/news/2015/05/bangladesh-authorities-must-deliver-justice-as-third-blogger-is-hacked-to-death/>

<sup>120</sup> International Federation of Journalists (2 October 2015) *Bangladesh must take action to end climate of intimidation and murder*

<http://www.ifj.org/nc/news-single-view/backpid/1/article/bangladesh-must-take-action-to-end-climate-of-intimidation-and-murder/>;

International Press Institute (3 November 2015) *With newest murders, assault on freedom of expression deepens in Bangladesh*

<http://www.freemedia.at/newssview/article/with-newest-murders-assault-on-freedom-of-expression-deepens-in-bangladesh.html>;

BBC News (7 August 2015) *'Nowhere is safe': Behind the Bangladesh blogger murders*

<http://www.bbc.com/news/blogs-trending-33822674> ;

BBC News (7 August 2015) *Bangladesh blogger Niloy Neel hacked to death in Dhaka*

<http://www.bbc.com/news/world-asia-33819032>; &

International Press Institute *op.cit.*,

<sup>121</sup> South Asia Terrorism Portal (7 September 2015) *Censorship by Murder*

<http://www.ein.org.uk/members/country-report/censorship-murder>;

Voice of America (28 September 2015) *Bangladesh Secular Bloggers Defiant Despite New Threats*

<http://www.ein.org.uk/members/country-report/bangladesh-secular-bloggers-defiant-despite-new-threats>; &

Human Rights Watch *op.cit.*,

<sup>122</sup> International Federation of Journalists *op.cit.*;

Voice of America (28 September 2015) *Bangladesh Secular Bloggers Defiant Despite New Threats*

<http://www.ein.org.uk/members/country-report/bangladesh-secular-bloggers-defiant-despite-new-threats>;

South Asia Terrorism Portal (19 October 2015) *Lethal Remnants*

<http://www.ein.org.uk/members/country-report/lethal-remnants>;

International Press Institute *op.cit.*,

Article 19 *op.cit.*; &

Article 19 (23 September 2015) *Bangladesh: International 'hit-list' is chilling development in threat to blogging*

<https://www.article19.org/resources.php/resource/38113/en/bangladesh-international-hit-list-is-chilling-development-in-threat-to-blogging>

## State protection

The militant Islamist group Ansarullah Bangla Team, claimed responsibility for the murder of Avijit Roy, and police in Bangladesh believe they are responsible for most of the killings of bloggers.<sup>123</sup> Ansarullah Bangla Team have continued to threaten bloggers, and in February 2016 police in Dhaka found a new list of targeted bloggers.<sup>124</sup> Amnesty International urged the government to provide a safe working environment for journalists and activists, and that those who seek to silence dissenting voices will not be tolerated and are brought to justice.<sup>125</sup> Reporters Without Borders in 2015 also noted the authorities' failure to bring those responsible for murdering bloggers to justice.<sup>126</sup>

<sup>123</sup> Voice of America *op.cit.*;

Washington Post *op.cit.*; &

BBC News (25 May 2015) *Bangladesh bans Islamist group accused of blogger attacks*

<http://www.bbc.com/news/world-asia-32879662>

Ansar al-Islam have also claimed responsibility for the killing of bloggers, see:

Human Rights Watch (27 January 2016) *World Report 2016, Bangladesh*

<https://www.hrw.org/world-report/2016/country-chapters/bangladesh>;

Associated Press (31 October 2015) *Publisher of secular books killed, 3 wounded in Bangladesh*

<http://news.yahoo.com/2-writers-publisher-stabbed-attack-bangladesh-capital-113412539.html>; &

Voice of America (20 November 2015) *Killings, Death Threats Feed Climate of Fear in Bangladesh*

<http://www.ein.org.uk/members/country-report/killings-death-threats-feed-climate-fear-bangladesh>

<sup>124</sup> Deutsche Welle (25 January 2016) *Bangladesh faces rising threat from ABT terror group*

<http://www.dw.com/en/bangladesh-faces-rising-threat-from-abt-terror-group/a-19003146>;

Associated Press *op.cit.*; &

Dhaka Tribune (22 February 2016) *Ansarullah planning to kill more bloggers*

<http://www.dhakatribune.com/crime/2016/feb/22/ansarullah-planning-kill-more-bloggers>

<sup>125</sup> Amnesty International (30 March 2015) *Bangladesh: Horrifying murder of blogger must be 'wake-up call'*

<https://www.amnesty.org/en/latest/news/2015/03/bangladesh-horrifying-murder-of-blogger-must-be-wake-up-call/>;

International Press Institute *op.cit.*,

Amnesty International (7 August 2015) *Bangladesh: Savage killing of blogger must not go unpunished*

<https://www.amnesty.org/en/latest/news/2015/08/bangladesh-savage-killing-of-blogger-must-not-go-unpunished/>;

Amnesty International (12 May 2015) *Bangladesh: Authorities must deliver justice as third blogger is hacked to death*

<https://www.amnesty.org/en/latest/news/2015/05/bangladesh-authorities-must-deliver-justice-as-third-blogger-is-hacked-to-death/>; &

Amnesty International (31 October 2015) *Bangladesh: horrific pattern of violence against freedom of expression*

<https://www.amnesty.org/en/latest/news/2015/10/bangladesh-horrific-pattern-of-violence-against-freedom-of-expression/>

<sup>126</sup> Reporters Without Borders *op.cit.*,

## Freedom of expression

Islamic militancy increased in 2015 resulting in Islamist violence against secular voices;<sup>127</sup> this trend continued into 2016.<sup>128</sup> Islamist violence is concurrent in Bangladesh with increasing official repression on freedom of expression.<sup>129</sup> Reports covering events of 2015 noted the government's crackdown on media critics, which included harassment and physical attacks alongside censorship.<sup>130</sup> The Committee to Protect Journalists in 2015 said that the recent upsurge in

<sup>127</sup> Associated Press *op.cit.*; BBC News (14 October 2015) *Who is behind the Bangladesh killings?* <http://www.bbc.com/news/world-asia-34517434>; International News Safety Institute (2016) *Country profile for Bangladesh* <http://www.newssafety.org/country-profiles/detail/13/bangladesh/>; Reuters (11 December 2015) *Nine injured in attack on Hindu temple in Bangladesh – police* <http://in.reuters.com/article/bangladesh-temple-attacks-idINKBN0TT2MM20151210>; Reuters (31 December 2015) *Bangladesh sentences two to death for blogger killing* <http://www.reuters.com/article/bangladesh-blogger-sentence-idUSKBN0UE0KP20151231>; & South Asia Monitor (4 February 2016) *Bangladesh in 2015: Delivering justice amidst rise of extremism* <http://southasiamonitor.org/detail.php?type=n&nid=15516>

<sup>128</sup> United States Institute of Peace (14 January 2016) *Preventing Violent Extremism through Inclusive Politics in Bangladesh* <http://www.ein.org.uk/members/country-report/preventing-violent-extremism-through-inclusive-politics-bangladesh>

<sup>129</sup> The Guardian *op.cit.*; & Human Rights Watch (18 August 2015) *Dispatches: Bangladesh's Machete Attacks On Free Speech* <https://www.hrw.org/news/2015/08/18/dispatches-bangladeshs-machete-attacks-free-speech>

<sup>130</sup> Human Rights Watch (27 January 2016) *World Report 2016, Bangladesh* <https://www.hrw.org/world-report/2016/country-chapters/bangladesh>; Article 19 (30 October 2015) *Bangladesh: Government failing to break Culture of Impunity* <https://www.article19.org/resources.php/resource/38165/en/bangladesh:-government-failing-to-break-culture-of-impunity>; European Parliament (26 November 2015) *European Parliament resolution of 26 November 2015 on freedom of expression in Bangladesh (2015/2970(RSP))* <http://www.ein.org.uk/members/country-report/european-parliament-resolution-26-november-2015-freedom-expression-bangladesh>; United States Department of State (14 October 2015) *2014 Report on International Religious Freedom – Bangladesh* <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=562105d615>; & FIDH - International Federation for Human Rights; OMCT - World Organisation Against Torture; WCADP - World Coalition Against the Death Penalty; AFAD - Asian Federation Against Involuntary Disappearances; ALRC - Asian Legal Resource Centre; Odhikar: (17 December 2015) *ICCPR List of Issues Submission Joint NGO Submission to the UN Human Rights Committee prior to the Adoption of the List of Issues for the review of Bangladesh* <http://ecoi.net/doc/318077>

violence against bloggers was occurring within a “culture of impunity”.<sup>131</sup> In January 2016 Bangladeshi NGO Odhikar reported on ongoing attacks against journalists.<sup>132</sup> Some bloggers have taken to self-censorship both to avoid security force repression and the attentions of Islamic militant groups.<sup>133</sup>

## Exile

Blogger Asif Mohiuddin was the victim of an Islamist machete attack and now lives in Germany;<sup>134</sup> many bloggers have fled Bangladesh since the recent upsurge in violence against them, while others have gone into hiding internally.<sup>135</sup> February 2016 marked one year after the murder of Avijit Roy and bloggers in Bangladesh continued to fear for their safety.<sup>136</sup>

## Conclusion

Two students were convicted in December 2015 for the murder of Raib Haider, who was the first blogger hacked to death in Bangladesh in February 2013; Haider, it was said in court, had been attacked by Islamist militants armed with meat cleavers.<sup>137</sup> Those

<sup>131</sup> The Guardian *op.cit.*,

<sup>132</sup> Odhikar (1 February 2016) *Human rights monitoring report: January 2016*, p.8

<http://odhikar.org/human-rights-monitoring-report-january-2016/>; &

<sup>133</sup> United States Department of State (25 June 2015) *2014 Country Reports on Human Rights Practices – Bangladesh*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=559bd58212>;

BBC News (7 August 2015) *'Nowhere is safe': Behind the Bangladesh blogger murders*

<http://www.bbc.com/news/blogs-trending-33822674>;

New York Times *op.cit.*;

International Press Institute *op.cit.*; &

The Guardian *op.cit.*,

<sup>134</sup> *ibid.*;

New York Times *op.cit.*; &

Hindustian Times (31 January 2016) *Bangladeshi bloggers keep fight going in exile*

<http://www.lexisnexis.com/en-us/gateway.page>

<sup>135</sup> Los Angeles Times (1 January 2016) *Bangladeshis get death sentences; The verdicts against two men are the first in the killings of writers in the nation*

[http://www.lexisnexis.com/uk/legal/results/docview/docview.do?docLinkInd=true&risb=21\\_T23557361919&format=GPNBFULL&sort=BOOLEAN&startDocNo=201&resultsUrlKey=29\\_T23557361931&cisb=22\\_T23557361930&treeMax=true&treeWidth=0&csi=306910&docNo=226](http://www.lexisnexis.com/uk/legal/results/docview/docview.do?docLinkInd=true&risb=21_T23557361919&format=GPNBFULL&sort=BOOLEAN&startDocNo=201&resultsUrlKey=29_T23557361931&cisb=22_T23557361930&treeMax=true&treeWidth=0&csi=306910&docNo=226); Deutsche Welle (25 February 2016)

*Bangladesh remains a dangerous country for bloggers* <http://www.dw.com/en/bangladesh-remains-a-dangerous-country-for-bloggers/a-19071140>;

Hindustian Times *op.cit.*;

CNN *op.cit.*; &

Human Rights Watch (27 January 2016) *Bangladesh: Government Shuts Down Critics*

<http://www.ein.org.uk/members/country-report/bangladesh-government-shuts-down-critics>

<sup>136</sup> Deutsche Welle *op.cit.*,

<sup>137</sup> BBC News (31 December 2015) *Death for Bangladesh blogger killers*



convicted were members of Ansarullah Bangla Team whose leader was also sentenced separately.<sup>138</sup> Police in February 2016 said progress has been made in most investigations surrounding the recent murders of bloggers.<sup>139</sup> Almost 2,000 arrests of extremists and militants including members of Ansarullah Bangla Team took place in 2015.<sup>140</sup> Ansarullah Bangla Team was banned in 2015, becoming the sixth Islamist militant group banned since 2005's anti-terrorism legislation.<sup>141</sup> The President in 2015 denounced bigotry and militancy prevalent in Bangladesh.<sup>142</sup> Demonstrations took place in the capital in 2015 supporting the rights of journalists and bloggers.<sup>143</sup>

<http://www.bbc.com/news/world-asia-35204243>;

Deutsche Welle *op.cit.*;

Voice of America (3 January 2016) *Bangladesh Blogger Killing Verdict Fails to Satisfy Community*

<http://www.ein.org.uk/members/country-report/bangladesh-blogger-killing-verdict-fails-satisfy-community>;

New York Times (1 January 2016) *Two Sentenced to Death in the Killing of a Blogger*

<http://www.lexisnexis.com/en-us/gateway.page>;

Committee to Protect Journalists (31 December 2015) *CPJ welcomes convictions in 2013 murder of Bangladeshi blogger*

<https://cpi.org/2015/12/cpi-welcomes-convictions-in-2013-murder-of-banglad.php>;

Reuters *op.cit.*; &

International Federation of Journalists (4 January 2016) *IFJ welcomes first convictions in blogger's murder in Bangladesh*

<http://www.ifj.org/nc/news-single-view/backpid/1/article/ifj-welcomes-first-convictions-in-bloggers-murder-in-bangladesh/>

<sup>138</sup> Wall Street Journal *op.cit.*;

New York Times (29 December 2015) *The Imperilled Bloggers of Bangladesh*

[http://www.nytimes.com/2016/01/03/magazine/the-price-of-secularism-in-bangladesh.html?\\_r=0](http://www.nytimes.com/2016/01/03/magazine/the-price-of-secularism-in-bangladesh.html?_r=0);

Asia News Network (1 January 2016) *Two sentenced to death for Bangladesh blogger murder*

[http://www.lexisnexis.com/uk/legal/results/docview/docview.do?docLinkInd=true&risb=21\\_T23557361919&format=GNBFULL&sort=BOOLEAN&startDocNo=201&resultsUrlKey=29\\_T23557361931&cisb=22\\_T23557361930&treeMax=true&treeWidth=0&csi=407957&docNo=208](http://www.lexisnexis.com/uk/legal/results/docview/docview.do?docLinkInd=true&risb=21_T23557361919&format=GNBFULL&sort=BOOLEAN&startDocNo=201&resultsUrlKey=29_T23557361931&cisb=22_T23557361930&treeMax=true&treeWidth=0&csi=407957&docNo=208);

BBC News *op.cit.*;

The Daily Star *op.cit.*;

Voice of America *op.cit.*; &

Reuters *op.cit.*,

<sup>139</sup> Dhaka Tribune (1 February 2016) *Police: Special security for bloggers at book fair*

<http://www.dhakatribune.com/bangladesh/2016/feb/01/police-special-security-bloggers-book-fair>

<sup>140</sup> South Asia Monitor *op.cit.*,

<sup>141</sup> Economist Intelligence Unit (5 January 2016) *Outlook for 2016-20: Political stability*

<http://www.lexisnexis.com/en-us/gateway.page>

<sup>142</sup> South Asia Terrorism Portal (16 November 2015) *Dangerous Resurgence*

<http://www.ein.org.uk/members/country-report/dangerous-resurgence>

<sup>143</sup> Article 19 (3 November 2015) *Bangladesh: More Murder and Demonstrations in Dhaka*

<https://www.article19.org/resources.php/resource/38171/en/bangladesh-more-murder-and-demonstrations-in-dhaka>; &

Meanwhile some bloggers, including those named on militant's hit lists, have vowed to remain in Bangladesh and continue writing.<sup>144</sup>



The Daily Star (20 November 2015) *Bangladesh holds literary festival amid security alerts – paper*

<http://monmol01.monitor.bbc.co.uk/mmu/>

<sup>144</sup> Voice of America (20 November 2015) *Killings, Death Threats Feed Climate of Fear in Bangladesh*

<http://www.ein.org.uk/members/country-report/killings-death-threats-feed-climate-fear-bangladesh>

## Country of Origin Information in the Asylum Process



Noeleen Healy, Smithfield Law Centre

### 1. Introduction

A refugee is, *inter alia*, a person who has “a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”<sup>145</sup>. An applicant presents a fear of persecution and bases a claim for a declaration of refugee status on this. If, however, the applicant is disbelieved in her claim, and country of origin information is not referred to, has that applicant’s claim been provided with an objective assessment?

### 2. European Law

An objective assessment is mandated by article 4 of the Qualification Directive, as transposed into Irish law by regulation 5 of European Communities (Eligibility for Protection) Regulations 2006<sup>146</sup>, which sets out member states’ obligations when assessing facts and circumstances relevant to an applicant’s claim. Article 4(3) requires, *inter alia*:

“The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm.”

### 3. The Horvath Principle And The Imafu Point

In the decision of *Camara v. Minister for Justice, Equality and Law Reform*<sup>147</sup>, Kelly J. quoted with approval the following passage from Professor Goodwin-Gill’s in ‘The refugee and international law’<sup>148</sup>:

“Simply considered, there are just two issues. First, could the applicant’s story have happened, or could his/her apprehension come to pass, on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable? If the story is consistent with what is known about the country of origin, then the basis for the right inferences has been laid.”

The case law has developed considerably and the question, thereby, arises as to whether a decision-maker is obliged to consider both of the above questions.

The principle line of case law begins with the *Imafu*<sup>149</sup> decision and a long line of decisions emanating therefrom.<sup>150</sup> Peart J., in *Imafu*, found that there was no obligation on a decision-maker to engage in a narrative discussion, in certain circumstances. The judge approved of the principle in *Horvath v. Secretary of State for the Home Department*<sup>151</sup>, where Peart J. states as follows<sup>152</sup>:

“It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our

<sup>147</sup> unreported, High Court, 26 July, 2000

<sup>148</sup> Oxford University Press, 2007

<sup>149</sup> *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416

<sup>150</sup> See, *inter alia*: *V.O. v. Minister for Justice Equality and Law Reform* [2009] IEHC 21; *O.A. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 78; *G.O. v. Refugee Appeals Tribunal* [2013] IEHC 89 at para.12; *P.D. v. Minister for Justice and Law Reform* [2015] IEHC 111; *H.J.E. (Nigeria) v. Minister for Justice, Equality and Law Reform* [2015] IEHC 189; *B.U. (Nigeria) v. Minister for Justice and Law Reform* [2015] IEHC 431

<sup>151</sup> [1999] INLR 7

<sup>152</sup> as quoted at p. 6 of *Imafu*

<sup>145</sup> Section 2 of the Refugee Act 1996 (as amended)

<sup>146</sup> S.I. 518/2006

view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin information. In other words, the probative value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin."

The learned judge, in *Imafu*, distinguished based upon the facts of the case, finding that the *Horvath* principle was logical where reference to country of origin information would have had a material effect, where particular events eluded to would require research, confirmation of occurrence and cross-checking against the applicant's narrative. Where, however, it was decided that no assessment of whether an applicant's claim fit into the factual context of her country of origin would remedy the negative credibility findings, it was not necessary. What should be highlighted from that decision was the stress placed by the judge on the fact that any divergence from the *Horvath* principle should be exceptional.

Peart J. stated, at p. 9 of *Imafu*:

"The reality, and reality must enter into these matters at this stage, is that the Tribunal Member while disbelieving the applicant completely as to her own particular story, would have seen that something like what the applicant has said about her life, if true, could potentially happen, because what she says happened is documented in a general way. To that extent any lingering doubt the Member may have had could be corroborated by the country of origin information, and could assist the assessment of credibility. But in the present case the applicant was not believed as to her personal tale, and it is reasonable to conclude therefore that no matter how much evidence or material may have been available as to the state of things in Nigeria from an objective viewpoint, this could not have persuaded the Member to believe the personal story. In this way the case is different from many other cases where the country of origin information may have the capacity to corroborate the actual story of the applicant."

This was elaborated upon in the decision in *G.A.A. v. Minister for Justice, Equality and Law Reform*<sup>153</sup>, where at para. 12, MacEochaidh J. set out as follows:

"My view is that no provision of Irish law and

<sup>153</sup> [2015] IEHC 519

no provision of European Union law require that there be an assessment of country of origin information in every case. That is not what European Union law requires. What European Union law requires is that all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection be assessed."

In the above case, it was disbelieved that the applicant was a member of the political party, to which he claimed to belong. His case would have been better assisted by him having attempted to secure evidence of his membership and/ or activities, rather than general information about the party itself.

#### 4. Supreme Court Position

In the case of *O.A.Y.A. v Refugee Appeals Tribunal*<sup>154</sup>, Hogan J. held, in circumstances where an applicant's claim to be at risk of FGM from a particular family member was found to lack credibility<sup>155</sup>, the tribunal member should have gone on to assess the objective country information where females from that particular tribe could still be at risk from the practice in a general sense. This was appealed by the state, to the Supreme Court.<sup>156</sup> Hardiman J. in delivering the *ex tempore* judgment, held that where the applicant's claim, based upon a fear of a particular person, was deemed not to be well-founded, then the tribunal member was not obliged to continue to assess the country information where it was found that the risk could never be a general fear.

The case here was slightly different from *Imafu* in that some country information had been referred to found that the risk of FGM emanated only from a family member and not the general population or government forces. The fear of the specific person was held not to be well-founded. Upon reference to the objective information it was found that the risk did not come from anyone outside the family, thereby not necessitating further exploration. Further reference would have had no material effect on the applicant's claim. This conclusion could only have been reached with the use of country information to find that the practice was only carried out by family members.

#### 5. Recent Certification to the Court of Appeal

In the recent case of *M.S.S. (Sri Lanka) v. Minister for*

<sup>154</sup> *A. (a minor) -v- Refugee Appeals Tribunal* [2011] IEHC 373

<sup>155</sup> Hogan J. specifically agreed with the tribunal member's assessment in this regard in his judgment

<sup>156</sup> Unreported, Supreme Court, Hardiman, Fennelly, O'Donnell, Clarke and MacMenamin JJ., 16th January, 2013

*Justice and Equality*<sup>157</sup>, at para. 58, Eagar J. held:

“The failure on the part of the Tribunal of the second named respondent to refer in any way to the situation in Sri Lanka in this Courts view failed to comply with the statutory duty imposed upon the protection decision makers under regulation 5 of the 2006 Regulations. Under regulation 5, protection decision-makers must take into account “all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied and the relevant statements and documentation presented by the protection applicant. The 2006 Regulations were passed after the decision in *Imafu*. It is this Courts view that the qualification suggested by Peart J. can no longer be relied on.”

In light of the decision of Humphreys J. in *R.A. v. Refugee Appeals Tribunal*<sup>158</sup>, and in not following previous jurisprudence of the High Court, namely the decision of Eagar J. in *M.M.S.*, Humphreys J. issued a certificate for the following question:

“[W]hether an asylum decision-maker is obliged to engage in a narrative discussion of country of origin information in a case where such information is not being positively rejected (in the sense that the decision is positively inconsistent with such information, as opposed to simply that the information is not considered to be relevant, necessary for the decision or sufficiently supportive of the claim made) including where the credibility of the applicant is being rejected generally.”<sup>159</sup>

The question arises as to whether the decision-maker is obliged to consult country of origin information in instances where the applicant's core claim is disbelieved, thereby, according to the decision-maker, carrying out a sort of academic exercise of analysing the potential occurrence of persecution claimed by an applicant where she is fundamentally disbelieved.

However, it has been argued that there exists 'a culture of disbelief'.<sup>160</sup> Therefore, if a decision-maker is not obliged, in circumstances where an applicant is

rejected on credibility, to engage with the objective information, this could, in instances, amount to claims being rejected without reference to anything other than the demeanour of an applicant. This would not be in line with the obligation, as per *Mallak v. Minister for Justice, Equality and Law Reform*<sup>161</sup>, to give reasons so that an applicant may be properly able to exercise her right to have a decision judicially reviewed and to ensure that the courts may effectively exercise the supervisory function over administrative decision-makers.<sup>162</sup>

## 6. Assessing Credibility

As was recently highlighted by Humphreys J.<sup>163</sup>, asylum and immigration law should not be viewed in isolation from the principles of judicial review, and public law generally. The principle in *Wednesbury*<sup>164</sup> requires that a decision not be unreasonable. If, however, a decision is based solely upon the demeanour of an applicant, the manner in which questions are answered and/ or perceived inconsistencies, where an applicant has not been given a fair opportunity to address these, then the applicant is not well enough armed to ensure that the decision was not in breach of the principles enunciated in both *Wednesbury* and *Mallak*. The decision of Cooke J. in *I.R. v. Refugee Appeals Tribunal*<sup>165</sup> is worth recalling at this point, where the learned judge stated, *inter alia*, as follows:

“11. So far as relevant to the issues dealt with in this judgment it seems to the Court that the following principles might be said to emerge from that case law as a guide to the manner in which evidence going to credibility ought to be treated and the review of conclusions on credibility to be carried out:-

1) The determination as to whether a claim to a well founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision-maker and not by the Court [...]

2) On judicial review the function and

<sup>161</sup> [2012] IESC 59

<sup>162</sup> See also: *Kikumbi v. Office of the Refugee Applications Commissioner* [2007] IEHC 11: reasons must be ‘proper, intelligible and adequate’; and *R.O. v. Minister for Justice and Equality* [2012] IEHC 573; and *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701

<sup>163</sup> *R.A. supra* n. 14 at para. 12

<sup>164</sup> *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223

<sup>165</sup> [2009] IEHC 353

<sup>157</sup> [2015] IEHC 659

<sup>158</sup> [2015] IEHC 686

<sup>159</sup> *F.A. v. Refugee Appeals Tribunal (no 2)* [2015] IEHC 830 at para. 23

<sup>160</sup> See: 'Difficult to believe', Irish Refugee Council Report, 2012

jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice.

3) There are two facets to the issue of credibility, one subjective and the other objective. An applicant must first show that he or she has a genuine fear of persecution for a Convention reason. The second element involves assessing whether that subjective fear is objectively justified or reasonable and thus well founded.

4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.

5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding.

6) The reasons must relate to the substantive basis of the claim made and not to minor matters or to facts which are merely incidental in the account given.

7) A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim.

8) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person.

9) Where an adverse finding involves

discounting or rejecting documentary evidence or information relied upon in support of a claim and which is *prima facie* relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.

10) Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached.”

There should be a level of curial deference to those trained in the exercise of the function, given those powers statutorily. All areas of public law require appropriate checks in place to ensure that those powers are exercised in line with principles of public law, particularly where decisions relating to protection applicants are some of the most crucial with literal life and death questions at stake.<sup>166</sup>

## 7. Discussion

For a clearer understanding of where the exceptional circumstances, as referred to by Peart J. in *Imafu*, may arise, some hypothetical examples may be useful. Take the example of a claim based upon an applicant from Macondo who cannot return because a spirit has placed a curse on his family. There, of course, may be underlying issues that a person has not disclosed, but the claim alone may not require a decision-maker to refer to country of origin information. The necessity for a claim to be objectively well-founded has not been met and reference to reports and pieces of research compiled on the situation in Macondo would not convince a decision-maker to grant status on the aforementioned claim. This, obviously, is an exceptional case.

Conversely, take the example of the applicant from Oceania who claims persecution emanating from the state utilising mind control techniques to suppress the political dissent, which is coupled with curtailment of

<sup>166</sup> The importance of the High Court's function can be clearly seen in Clarke J.'s decision *A.A.M.O. (Sudan) v. Refugee Appeals Tribunal* [2014] IEHC 49, and particularly at para. 23, where the judge states: “[T]he only conclusion which the Court could draw for the Tribunal’s decision not to recommend that the applicant should be declared a refugee is that the Tribunal Member simply did not like the applicant.”]

any opposing political activity. Mind control technique may, on the face, appear unbelievable to a person charged with making the decision. However, the applicant, particularly if disclosing through an interpreter or English, where it is not her first language, might mean propaganda. Although appearing at first, fantastical, an analysis of country information would serve to frame the statements and expand on the applicant's evidence.

A further underlining problem, relates to perceived normative behaviours in a particular culture. Exactly that which Professor Said argues has been imputed onto Middle Eastern peoples. Professor Said contends:

“The Orient and Islam have a kind of extrareal, phenomenologically reduced status that puts them out of reach of everyone except the Western expert. From the beginning of Western speculation about the Orient, the one thing the Orient could not do was to represent itself. Evidence of the Orient was credible only after it had passed through and been made firm by the refining fire of the Orientalist’s work.”<sup>167</sup>

A decision-maker must ensure that their internal representation of a culture is not being imputed onto the applicant and her claim being disbelieved as a result. It is essential the full picture is assessed. If a person claims torture by a state official, then that person is likely to be evasive and distrustful of authority. However, the expected reaction should not be assumed.<sup>168</sup> If an applicant’s claim is based, for example, upon sexual orientation, then expected demeanour attributes should not be imputed by the decision-maker.<sup>169</sup> Only upon reference to country information could a decision-maker analyse the applicant's claim and make a fair assessment. These claims cannot be assessed ‘in the round’<sup>170</sup> without adequately framing the claim and assessing the picture as a whole.

In this state's common law, adversarial system, the burden of proof usually rests upon the applicant making the claim. This is the case where an applicant decides to bring judicial review proceedings. However, in substantive protection decisions, there is a shared burden of proof, and a burden to investigate, placed upon the decision-maker. Section 11(1) of the Refugee

Act 1996 (as amended) provides:

“Where an application is received by the Commissioner under section 8 [...] it shall be the function of the Commissioner to investigate the application for the purpose of ascertaining whether the applicant is a person in respect of whom a declaration should be given.”

The foregoing does not suppose that an officer of the Refugee Applications Commissioner should venture to Oceania to investigate whether the political oppression, in our above example, reaches the threshold of persecution, as claimed by the applicant. The facilities of the Refugee Documentation Centre are readily available to the officers and all others involved in the status determination process.

## 8. Conclusions

There is clearly a divergence in the case law and the recently certified question to the Court of Appeal may provide clarity, particularly for future applicants, who wish to consider having a negative decision or recommendation judicially reviewed. The question of whether an applicant is entitled to a narrative exploration of objective country information where the subjective element of the claim, namely, the fear has been rejected is a matter for the Court of Appeal. However, what is clear from the jurisprudence is that a decision-maker must ensure that all relevant facts are assessed and, when deciding to reject a claim based upon credibility, it would prove challenging to properly frame the fear and provide a reasoned decision without reference to information about the applicant’s country of origin.

<sup>167</sup> Edward Said, ‘Orientalism’ (Pantheon Books, 1978) at p.284

<sup>168</sup> See: *H.K. v. Secretary of State for the Home Department* [2006] EWCA Civ. 1037; *Y v. Secretary of State for the Home Department* [2006] EWCA Civ. 1223

<sup>169</sup> See *M.A. [Nigeria] v. Refugee Appeals Tribunal* [2016] IEHC 16 paras. 17-20 for a full survey of the caselaw.

<sup>170</sup> *Imafu supra* n.5 at p. 11



## South Sudan's Civil War: RDC Researcher David Goggins Investigates



David Goggins, Refugee Documentation Centre

### A New Country is Born

After a long struggle for independence from Sudan, South Sudan became the World's newest nation on 9 July 2011. This was after a war between the ethnic African peoples of the region and the Arab-dominated government in Khartoum which began in 1983 and which became Africa's longest civil war. Several years of negotiations resulted in a peace deal in 2005 followed by a referendum in 2010 in which 98% of the voters choose separation from Sudan. The new state's leader was Salva Kiir, a founding member of the Sudan People's Liberation Movement (SPLM), the political wing of the Sudan People's Liberation Army which had led the fight for freedom. Kiir was recognised as president of South Sudan on the basis of having won an election in 2010 while the country was still part of Sudan. Former rebel leader Riek Machar became vice-president. Government of the new state was dominated by the SPLM, which controlled the legislature and nine of the ten state governorships.<sup>171</sup> The long neglect of the region by Khartoum meant that despite having vast reserves of the oil the new country remained one of the least developed in the World. Ongoing problems included unresolved border disputes with Sudan, which sometimes led to violent clashes, and intertribal conflicts between many of the country's sixty ethnic groups. The state also failed to provide basic public services to its citizens and there was widespread nepotism and large scale corruption by state officials.

<sup>171</sup> US Department of State (25 June 2015) 2014 Country Reports on Human Rights Practices - Ethiopia

### Genesis of a Civil War

From the outset there were tensions between president Salva Kiir and his vice president Riek Machar. What began as a political quarrel soon developed into rivalry between the country's largest ethnic group the Dinka, which supported Kiir, and the second largest group the Nuer, which supported Machar. The power struggle came to a head in July 2013 when president Kiir sacked his entire cabinet, including the vice president. In a contemporary report on this crisis UK newspaper The Guardian stated:

“The collapse of the government raised the prospect of escalating violence in the world's youngest country, which gained independence from Sudan two years ago this month. Kiir's popularity has suffered from a perceived failure to end high poverty rates, lack of infrastructure, internal repression, and widespread official corruption. With Kiir giving no indication when a new government may be formed, sources in the capital Juba suggested a prolonged standoff between the president and his opponents that could split the SPLM into two or more rival camps, raise tensions between the powerful Dinka and Nuer tribal groups, and wreck plans for elections in 2015.”<sup>172</sup>

### The Fighting Begins

Relations between the two leaders worsened, with Machar criticising Kiir for failing to tackle corruption and Kiir accusing Machar of plotting a coup. In December 2013 the situation deteriorated into open warfare between the rival factions when Dinka members of the presidential guard attempted to disarm members of Nuer ethnicity. Human Rights Watch summarised this incident as follows:

“On the night of December 15, 2013, a gun battle in South Sudan's capital Juba between presidential guards loyal to President Salva Kiir on one side, and on the others, soldiers loyal to the former vice president, Riek Machar, triggered a national conflict that has since killed thousands of civilians, forced some 2.2 million people from their homes, and plunged much of the country into a humanitarian crisis.”<sup>173</sup>

In the weeks following the initial outbreak of violence Dinka members of the security forces were reported to have killed Nuer civilians in the capital city Juba, while Nuer forces were alleged to have killed Dinka civilians in the town of Bor. Fighting soon spread to

<sup>172</sup> The Guardian (24 July 2013) South Sudan president sacks cabinet in power struggle

<sup>173</sup> Human Rights Watch (December 2015) “We Can Die Too”: Recruitment and Use of Child Soldiers in South Sudan

the Upper Nile, Jonglei and Unity states. In January 2014 President Kiir declared states of emergencies in these states.

### Attacking Civilians

From the very outset of hostilities both government and rebel forces deliberately targeted civilians. Commenting on these attacks against civilians Amnesty International states:

“Both government and opposition forces disregarded international human rights and international humanitarian law. Both sides deliberately attacked civilians, often based on their ethnicity or assumed political affiliations. They attacked civilians sheltering in hospitals and places of worship; executed captured fighters; abducted and arbitrarily detained civilians; burned down homes; damaged and destroyed medical facilities; looted public and private property as well as food stores and humanitarian aid; and recruited children to serve in their armed forces.”<sup>174</sup>

The 2015 Freedom House report on South Sudan similarly lists allegations of human rights abuses committed by government security forces:

“Members of the SPLA, the South Sudan National Police Service (SSNPS), and the NSS have played a central role in the violence that has engulfed South Sudan since December 2013. UNMISS and human rights organizations have accused members of the security services of involvement in extrajudicial killings, attacks on civilians, enforced disappearances, destruction of property, and sexual violence.”<sup>175</sup>

### Slaughter in Unity State

The oil-rich Unity state has been the scene of heavy fighting between the SPLA and its allies and the rebel Sudan People’s Liberation Movement/Army-In-Opposition, known as the IO. Reporting on the burning of villages and the killing of civilians which occurred during a government offensive in the state in April 2015 Human Rights Watch states:

“In April and May of this year in central Unity, government forces, especially allied armed militia from the Bul Nuer ethnic group, killed, beat, and raped scores of civilians, particularly women, burned homes and food stocks in over two dozen small towns, villages, and settlements, and stole tens of thousands of

cows, goats, and sheep, as well as clothes, food, cooking utensils, and other materials.”<sup>176</sup>

Human Rights Watch suggests that the actions of the government forces were a deliberate attempt to drive the civilian population out of the area.

Direct attack by combatant forces is not the only hardship faced by the civilian population. Despite the fact that South Sudan is a very fertile country there is now a serious risk of famine due to the effect that the war has had on food production. In a report on this crisis Amnesty International states:

“An estimated 40,000 people in Unity State, which has seen some of the worst violence and abuses since the armed conflict broke out in 2013, are facing catastrophic shortages in basic supplies. But it is not drought or environmental factors that have brought on their hunger. Their hunger is instead the consequences of regular and intentional attacks by government soldiers and allied militias, not only on food supplies – the cattle and crops that civilians rely on – but also on humanitarian agencies working in the country. In southern Unity State, cattle raids by warring parties have left civilians without staples such as milk. Many subsist on water lilies and fish, but as flood waters have receded, even those food sources have become scarcer.”<sup>177</sup>

### Worse Than Syria?

The conflict in South Sudan has been almost totally ignored by the world media. This absence of reporting means that there is a lack of reliable information as to how many people have died as a result of the war. Several sources have suggested that the number of civilians killed is higher than the death toll among civilians in the far more publicised conflict in Syria. In an opinion piece published in the New York times Nicholas Kristof speculates on this conundrum as follows:

“The Syrian Observatory for Human Rights estimates that 13,249 civilians were killed in Syria in fighting in 2015 (many more combatants were killed, on both government and rebel sides). In South Sudan, we don’t have solid figures, but a U.N. official has estimated 50,000 deaths total over a bit more than two years, and another has said simply ‘tens of thousands.’ Sue Lautze, the deputy humanitarian coordinator for the U.N. in South Sudan, told me that she has been unable

<sup>174</sup> Amnesty International (24 February 2016) Amnesty International Report 2015/16 – South Sudan

<sup>175</sup> Freedom House (19 June 2015) Freedom in the World 2015 – South Sudan

<sup>176</sup> Human Rights Watch (21 July 2015) “They Burned it All”: Destruction of Villages, Killings, and Sexual Violence in Unity State South Sudan

<sup>177</sup> Amnesty International (25 February 2016) South Sudan’s man-made hunger crisis



to derive an accurate death count but that if pressed, she believes the 50,000 estimate “may well be an underestimation.” Likewise, Jehanne Henry of Human Rights Watch, who has spent her time bouncing around remote parts of the country, says of the 50,000 estimate: “I think the figure is probably higher but really don’t have any scientific way to show it. The gap in the death toll information encapsulates how neglected this conflict is — no one is even counting the dead.”<sup>178</sup>

### A Displaced population

The war has resulted in the large scale displacement of the civilian population. In July 2015 the UNHCR reported that there were about 1.5 million internally displaced persons in South Sudan, and more than 730,000 who have fled into neighbouring countries. Ironically, South Sudan hosts nearly 250,000 refugees who have fled fighting in a separate conflict in Sudan’s Blue Nile and South Kordofan states.<sup>179</sup>

### Arbitrarily Detained

According to human rights sources there is widespread arbitrary arrest of civilians by the government security services. Persons detained included leaders of opposition groups, civil society activists, businesspeople, journalists and members of ethnic groups perceived to be opposed to the government. These detainees allegedly suffered grievous human rights abuses, such as those described in a report from Human Rights Watch which states:

“Since the beginning of the conflict, South Sudan’s National Security Service (NSS) and military intelligence detained hundreds of men for alleged connections with opposition forces, some for as long as a year, often in inhumane conditions. Most detainees were beaten and many tortured. None of the detainees was allowed access to a lawyer or judge. Former detainees held in the NSS Riverside detention site in Juba were held in dark, unbearably hot rooms. Detainees held by military intelligence in Eastern Equatoria and in Juba were tortured including with pliers, suffocation with a plastic bag, or jets of water directed at their faces.”<sup>180</sup>

Sources note that the South Sudanese judicial system is incapable of providing a fair trial to accused persons.

<sup>178</sup> New York Times (11 March 2016) Are as Many Civilians Dying in South Sudan as in Syria?

<sup>179</sup> UNHCR (7 July 2015) More than 2.25 million now displaced in South Sudan and across its borders

<sup>180</sup> Human Rights Watch (27 January 2016) World Report 2016 - South Sudan

### Death in Leer

Particularly horrifying was the treatment meted out to several dozen men and boys in the town of Leer in Unity State following their detention by government forces in October 2015. This incident was thoroughly investigated by researchers from Amnesty International who revealed the fate of the detainees in a report which states:

“According to witnesses, the containers had no air holes or vents and caused detainees held in at least one to die from suffocation while in the custody of the government forces. Amnesty International has gathered evidence indicating that government forces, including the area commander at the time, stationed immediately outside the container, were aware of the detainees’ extreme distress and decided to keep them locked inside the container even after some individuals had died.”<sup>181</sup>

### Children at War

There is compelling evidence that both sides in the conflict have made use of child soldiers. Describing the recruitment of young boys Human Rights Watch states:

“Many boys have fought because they have been forced to, in the most brutal way. In many cases including dozens documented below, boys were recruited at gun point by soldiers, were arrested and then put in detention facilities until they agreed to fight or were simply abducted, handed a gun and then, sometimes within a day, thrown into battle.”<sup>182</sup>

### A Peace Process Begins

To date there have been at least seven peace deals signed by the parties to the conflict, all of which were broken. One such ceasefire agreed on 8 November 2014 lasted only a few hours.<sup>183</sup>

Referring to a ceasefire signed in January 2015 Freedom House states:

“A cessation of hostilities agreement reached in January made little difference on the ground. Both sides continued to interfere with humanitarian access to the worst affected areas and appeared immune to international pressure, including the announcement of

<sup>181</sup> Amnesty International (March 2016) ‘Their Voices Stopped’: Mass Killing in a Shipping Container in Leer, South Sudan

<sup>182</sup> Human Rights Watch (December 2015) “We Can Die Too”: Recruitment and Use of Child Soldiers in South Sudan

<sup>183</sup> Al Jazeera (15 December 2015) South Sudan marks two years of ruinous war

sanctions by the United States and European Union against some of the key protagonists. Negotiations dragged on, with neither side showing any urgency to end the fighting.”<sup>184</sup>

Faced with the threat of UN sanctions President Salva Kiir and opposition leader Riek Machar signed an internationally mediated peace accord in August 2015. Under this agreement there was to be an immediate ceasefire, the creation of a transitional government, reinstatement of Machar as vice-president and the integration of government and rebel forces.<sup>185</sup> Each side has repeatedly accused the other of breaking this ceasefire, as noted in a BBC News report which states:

“Fighting was supposed to stop immediately but there have been frequent violations.”<sup>186</sup>

One impediment to a cessation of hostilities is the existence of numerous armed groups who each have their own reasons for fighting. In a report on the situation in Jonglei state the International Crisis Group refers to the obstacles to peace posed by such groups:

These armed groups’ *casus belli* are often different from those of Kiir and Machar, and many do not support the peace process, creating a chaotic environment on the ground. Most of these groups are not fighting for control of the government in Juba and some of their conflicts are best resolved at the state or local level. Yet if they are ignored the main protagonists will use these groups to continue the fight and derail national peace efforts.”<sup>187</sup>

## Recent Events

Despite many difficulties progress has been made on establishing a Transitional Government of National Unity. A report by the UN Secretary-General on developments between 10 November 2015 and 2 February 2016 states:

“On 7 January, the President, Salva Kiir, appointed the 50 additional Members of National Legislative Assembly. On the same date, the parties agreed on the allocation of ministerial and deputy ministerial portfolios in the Transitional Government of National Unity.”<sup>188</sup>

<sup>184</sup> Freedom House (19 June 2015) Freedom in the World 2015 – South Sudan

<sup>185</sup> International Business Times (28 January 2016) South Sudan conflict: Five reasons why the civil war is happening

<sup>186</sup> BBC News (12 February 2016) South Sudan president reappoints rival as part of peace deal

<sup>187</sup> International Crisis Group (22 December 2014) South Sudan: Jonglei – “We Have Always Been at War”

<sup>188</sup> UN Security Council (9 February 2016)

Although the peace agreement has officially ended hostilities there remains widespread violence throughout the country. There are numerous reports of killings and other crimes, with a particularly serious outbreak of fighting on 17 February 2016 between ethnic Dinka and Shilluk in Malakal. Civilians were not safe even in the UN camp in Malakal, which came under attack. In a report on this incident Human Rights Watch states:

“Two weeks ago in South Sudan, the United Nations compound in Malakal, a refuge for nearly 50,000 people, came under attack. While details are murky, credible reports indicate that South Sudanese government forces, with allied militia, forced their way into the camp, shot civilians, and burned homes as UN peacekeepers stood by. At least 25 people, including three aid workers, were killed, and more than 120 wounded. Much of the camp burned to ashes”<sup>189</sup>

At present the August 2015 peace agreement appears to be holding and may lead to a permanent resolution to the conflict, but violence still continues, the economy is in ruins and the displaced population is in need of considerable humanitarian assistance.

All reports and documents referred to in this article may be obtained upon request from the Refugee Documentation Centre.



<sup>189</sup> Human Rights Watch (4 March 2016) UN Should Investigate South Sudan Attack

## New country priorities on ecoi.net



Boris Panhölzl, Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD)

Starting with April 2016, we updated our list of country priorities. These priorities define which sources are covered on ecoi.net, i.e. which documents you can expect to find for a country. This update is based on Austrian, European and global asylum statistics and affects the coverage of a wide range of sources and countries on ecoi.net.

### Source coverage

More than 160 sources are covered regularly on ecoi.net. Our team of content managers regularly screens these sources' publications for inclusion on ecoi.net. Countries from priority A receive the most coverage, priority E receive the least coverage. To ensure consistency, we use statistics from the past three years. Statistics on applications lodged in Austria and the EU are weighted slightly higher during our ranking.

Furthermore, we divide our regularly covered sources into 4 categories. These categories are then mapped onto the country priorities.

The following table illustrates which source category is covered for which country priority:

Country priority	Source categories to cover				Coverage of additional information
	1	2	3	4	
A	At least one source				
B	either category 1	or category 2			
C					
D			Reduced coverage		Information on reception conditions
E			Reduced coverage		

Sources of category 4 are covered for all countries available on ecoi.net. These are, for instance, UNHCR and COI units like the Immigration and Refugee Board's Research Directorate.

Sources of category 3 are covered for countries of priorities A to C. Some publications from these sources are also covered for countries of lower priorities. This means that, for instance, Amnesty International and Human Rights Watch are regularly covered for country priorities A to C, but only their respective Annual Report is covered for priorities D and E. Other examples for sources of category 3 are IWPR and the International Crisis Group.

Sources of category 2 are covered for country priorities A and B2. These are media sources with a high output of publications and with no humanitarian or human rights focus: currently, these are BBC News and Agence France-Presse (AFP, which we cover via Reliefweb).

Sources of category 1 are covered for country priorities A and B1. Category 1 consists of sources that have a focus on a specific country or region. For instance, the Afghanistan Research and Evaluation Unit, or the Congressional-Executive Commission on China (CECC).

Countries of priority A receive coverage of *at least one* source of category 1. For the countries ranked as priority B, we decide for each of them whether to provide coverage via country-specific sources (priority "B1", example: China with the CECC amongst others), *or* via category 2 sources (priority "B2", example: Central African Republic).

Countries of priority D are a special case: they receive additional coverage of information on reception conditions of third-country citizens. That is, information on the asylum system, or international protection in general. In the European Union, this is mainly relevant for the Dublin Regulation.

Please see <http://www.ecoi.net/5.our-sources.htm> for a list of the sources we regularly cover, which kind of publications we are covering for each of these sources, and for which country priorities they are covered.

### Country priorities

These are our new country priorities:

**A** **Countries**  
Afghanistan; Bangladesh; Congo, Democratic Republic; Eritrea; Iran; Iraq; Nigeria; Pakistan; Russian Federation; Somalia; Sri Lanka; Syrian, Arab Republic; Ukraine

**B1** Countries

Albania; China; Georgia; India; Indonesia; Macedonia, the Former Yugoslav Republic of; Myanmar; Occupied Palestinian Territories; Serbia; South Sudan

**B2** Countries

Algeria; Armenia; Bosnia and Herzegovina; Burundi; Cameroon; Central African Republic; Colombia; Côte d'Ivoire; Egypt; El Salvador; Ethiopia; Gambia, The; Guatemala; Guinea; Kazakhstan; Kosovo; Kyrgyzstan; Mali; Mexico; Morocco; Rwanda; Sudan; Tunisia; Turkey; Turkmenistan; Uganda; Uzbekistan; Vietnam; Zimbabwe

**C** Countries

Angola; Azerbaijan; Belarus; Chad; Congo; Ghana; Haiti; Honduras; Lebanon; Libya; Malawi; Mauritania; Moldova, Republic; Mongolia; Nepal; Philippines; Senegal; Tajikistan; Yemen

**D** Countries

Austria; Belgium; Bulgaria; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Netherlands; Norway; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden; Switzerland; United Kingdom

**E** Countries

Argentina; Australia; Bahrain; Benin; Bhutan; Bolivia; Botswana; Brazil; Burkina Faso; Cambodia; Canada; Chile; Costa Rica; Croatia; Cuba; Djibouti; Dominican Republic; Ecuador; Equatorial Guinea; Gabon; Guinea-Bissau; Israel; Jamaica; Japan; Jordan; Kenya; Korea, Democratic People's Republic; Korea, Republic; Kuwait; Lao People's Democratic Republic; Lesotho; Liberia; Madagascar; Malaysia; Maldives; Montenegro; Mozambique; Namibia; New Zealand; Nicaragua; Niger; Oman; Panama; Paraguay; Peru; Qatar; Saudi Arabia; Sierra Leone; Singapore; South Africa; Suriname; Swaziland; Taiwan; Tanzania, United Republic; Thailand; Timor-Leste; Togo; United Arab Emirates; United States; Uruguay; Venezuela; Western Sahara; Zambia

If you have questions or suggestions, please do not hesitate to contact us: [info@ecoi.net](mailto:info@ecoi.net).

